

***United States Court of Appeals
for the Second Circuit***



APPENDIX

B
AS

77-4146

United States Court of Appeals
FOR THE SECOND CIRCUIT

LLOYD CARR & CO., LLOYD CARR FINANCIAL CO., JAMES A.
CARR AND CHARLES P. LEMIEUX III,

Petitioners,

against

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

**Petition for Review of Order of the
Commodity Futures Trading Commission**

**APPENDIX TO BRIEF OF PETITIONERS
VOLUME I
PLEADINGS, MOTIONS AND ORDERS**

Of Counsel:

LESLIE H. ARPS
BARRY H. GARFINKEL
DANIEL J. PILIERO II
DOUGLAS M. KRAUS

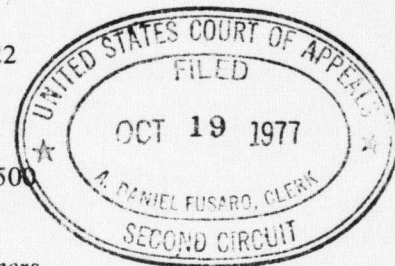
GEORGE E. BUSHNELL
NOEL A. GAGE
DANIEL J. HENRY, JR.
LYNN SCHECTER

SKADDEN, ARPS, SLATE, MEAGHER,
& FLOM

Office and P.O. Address:
919 Third Avenue
New York, New York 10022
Tel. (212) 371-6000

BUSHNELL, GAGE & REIZEN
Office and P.O. Address:
3000 Town Center, Suite 1500
Southfield, Michigan 48075
Tel. (313) 444-4848

Attorneys for Petitioners



PAGINATION AS IN ORIGINAL COPY

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COMMODITY FUTURES TRADING COMMISSION

2033 K Street, N.W., Washington, D.C. 20581

February 4, 1977

CERTIFIED RETURN REQUESTED

James A. Carr and Charles P. Lemieux d/b/a
Lloyd, Carr & Co., a partnership
84 State Street
Boston, Mass. 02109

Mr. James A. Carr
6 Revere Street
Hull, Mass.

Lloyd Carr Financial Co.
84 State Street
Boston, Mass. 02109

Mr. Charles P. Lemieux, III
391 Marlborough Street
Boston, Mass. 02109

Re: In the Matter of James A. Carr and Charles P. Lemieux, III
d/b/a Lloyd, Carr & Co., a partnership, Lloyd Carr Financial
Co., James A. Carr, Charles P. Lemieux, III - CFTC Docket
No. 77-6

Gentlemen:

Enclosed please find a copy of the Commission's Complaint and Notice of Hearing Pursuant to Sections 6(b), 6(c), and 8a(2) and (3) of the Commodity Exchange Act, As Amended, in the above-captioned proceeding. An original and five (5) copies of your Answer, and all pleadings, are required to be filed with the Hearing Clerk, Office of Hearings and Appeals, at the above address.

In addition, two copies of each pleading which you file with this office are required to be served upon the Division of Enforcement, Commodity Futures Trading Commission.

Your particular attention is directed to Section IV of the Complaint which requires you to file an Answer within twenty (20) days after receipt of this letter. Section 10.23(c) of the Commission's Rules of Practice (17 CFR §10.23(c)) provides that if you fail to file the required Answer, you shall be in default and pursuant to the procedures set forth in section 10.93 of the Rules of Practice (17 CFR §10.93) the proceedings may be determined against you.

Very truly yours,

Deedra K. Jones

Deedra K. Jones

Hearing Clerk

Office of Hearings and Appeals

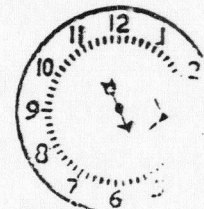
Enclosure

cc: Michael Stewart, Richard Levie, ENF
ddonato 2/4/77

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FEB 3 77

UNITED STATES OF AMERICA
BEFORE THE
COMMODITY FUTURES TRADING COMMISSION



RECEIVED
CFTC
HEARING CLERK

In the Matter of	:	CFTC Docket No. 77-6
JAMES A. CARR and	:	
CHARLES P. LEMIEUX, III d/b/a	:	
LLOYD, CARR & CO., a partnership	:	COMPLAINT AND NOTICE
84 State Street	:	OF HEARING PURSUANT
Boston, Massachusetts 02109	:	TO SECTIONS 6(b), 6(c),
	:	and 8a(2) and (3) OF
LLOYD CARR FINANCIAL CO.	:	THE COMMODITY EXCHANGE
84 State Street	:	ACT, AS AMENDED
Boston, Massachusetts 02109	:	
JAMES A. CARR	:	
CHARLES P. LEMIEUX, III	:	
RESPONDENTS	:	

I

The official files of the Commission disclose that:

(A) On or about November 19, 1976, Lloyd Carr Financial Co. became registered with the Commission as a commodity trading advisor pursuant to Sections 4n and 8a(1) of the Commodity Exchange Act, as amended ("the Act"), and it is still so registered with the Commission.

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(B) On January 25, 1977 an application for registration as an FCM in the name of Lloyd, Carr & Co. was filed with the Commission. This application is still pending.

(C) James A. Carr and Charles P. LeMieux, III are partners in both Lloyd, Carr & Co. and Lloyd Carr Financial Co.

(D) James A. Carr is not registered with the Commission as an associated person or in any other capacity.

(E) Charles P. LeMieux, III is registered with the Commission as an associated person.

II

Members of the staff have reported to the Commission information upon which it is alleged that:

(A) Since on or about January 17, 1977, James A. Carr and Charles P. LeMieux, III doing business as Lloyd, Carr & Co., a partnership, (hereinafter referred to as "Lloyd, Carr & Co."), aided and abetted by James A. Carr and Charles P. LeMieux, III, has accepted and continues to accept monies, securities or property (or has extended credit in lieu thereof) from option customers as payment of the purchase price in connection with commodity option purchases while Lloyd, Carr & Co. has not been registered with the Commission as a futures commission merchant, as required by Section 4c(b) of the Act and Section 32.3(a) of the Rules and Regulations promulgated thereunder.

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(B) Since on or about January 17, 1977, Lloyd, Carr & Co., aided and abetted by James A. Carr and Charles P. LeMieux, III, has solicited and accepted and continues to solicit and accept orders for the purchase or sale of commodity options or has supervised and continues to supervise persons so engaged, while Lloyd, Carr & Co. and persons associated with Lloyd, Carr & Co. have not been registered with the Commission as a futures commission merchant or as associated persons of a registered futures commission merchant, respectively, as required by Section 4c(b) of the Act and Section 32.3(b)(1) of the Rules and Regulations thereunder.

(C) Since on or about January 17, 1977, Lloyd, Carr & Co., aided and abetted by James A. Carr and Charles P. LeMieux, III, has permitted and continues to permit individuals to become and remain associated with Lloyd, Carr & Co. as partners, officers or employees (or in any similar status or position involving similar functions) in capacities involving solicitation, acceptance or supervision when Lloyd, Carr & Co., James A. Carr and Charles P. LeMieux, III, knew or should have known that such individual or individuals was not registered with the Commission as an associated person, as required by Section 4c(b) of the Act and Section 32.3(b)(2) of the Rules and Regulations promulgated thereunder.

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(D) Since on or about January 17, 1977, Lloyd, Carr & Co., aided and abetted by James A. Carr and Charles P. LeMieux, III, has failed and continues to fail to prepare and keep current ledgers or other similar records which show or summarize with appropriate references to supporting documents, each transaction affecting its assets, liability, income, expense and capital accounts, and in which all its asset, liability and capital accounts are classified into either the account classification subdivision specified on Form 1-FR or categories that are in accord with generally accepted accounting principles, as required by Section 1.18(a) of the Rules and Regulations promulgated under the Act.

(E) Since on or about January 17, 1977, Lloyd, Carr & Co., aided and abetted by James A. Carr and Charles P. LeMieux, III, has failed and continues to fail to keep the full, complete and systematic records together with all pertinent data and memoranda of or relating to such commodity option transactions, as required by Section 4c(b) of the Act and Section 32.7 of the Rules and Regulations promulgated thereunder.

(F) On January 27, 1977 Lloyd, Carr & Co. refused to permit Commission personnel to examine Lloyd, Carr & Co.'s books and records and to perform an additional audit to determine

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whether Lloyd, Carr & Co. was presently complying with the record, bookkeeping and minimum financial requirements, as required by Section 4c(b) of the Act and Sections 1.18, 1.31 and 32.7 of the Rules and Regulations thereunder.

III

By reason of the allegations made by the Commission's staff, the Commission deems it necessary and appropriate, pursuant to its responsibilities under the Act, that public proceedings be instituted to determine whether the statements above set forth in Section II are true and, if so:

(A) whether, pursuant to Sections 6(b) and 8a(3) of the Act, the registration of Lloyd Carr Financial Co. as a commodity trading advisor should be suspended or revoked;

(B) whether, pursuant to Section 8a(2) of the Act, Lloyd, Carr & Co.'s application for registration as a futures commission merchant should be refused; and

(C) whether cause exists why an appropriate order should not be made and entered in accordance with Sections 6(b) and 6(c) of the Act:

(1) Directing that Lloyd Carr Financial Co., Lloyd, Carr & Co., James A. Carr and Charles P. Lemieux, III cease and desist from violating the Act, in the manner alleged in Section II supra;

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(2) Prohibiting the Lloyd Carr Financial Co., Lloyd, Carr & Co., James A. Carr and Charles P. LeMieux, III from trading on or subject to the rules of any contract market and requiring all contract markets to refuse such persons all trading privileges thereon; and

(3) Assessing Lloyd Carr Financial Co., Lloyd Carr & Co., James A. Carr and Charles P. LeMieux, III each with a civil penalty of not more than \$100,000 for each violation.

IV

The Commission, deeming it necessary and appropriate pursuant to its responsibilities under the Act not to grant registration of the Lloyd, Carr & Co. pending final determination of the questions above set forth at Section III, thus:

ORDERS that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof be held before an Administrative Law Judge at a time and place to be fixed as provided by Section 10.61 of the Rules of Practice under the Commodity Exchange Act, as amended, (17 C.F.R. § 10.61), and that all post hearings procedures shall be conducted pursuant to Sections 10.81 through 10.107 of the Rules of Practice (17 C.F.R. §§ 10.81 - 10.107).

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IT IS FURTHER ORDERED that respondents shall file an answer to the allegations contained in this Complaint within 20 days after service pursuant to Section 10.23 of the Rules of Practice (17 C.F.R. § 10.23). If respondents fail to file the required answer or fails to appear at a hearing after being duly notified, such parties shall be deemed in default and the proceedings may be determined against respondents upon consideration of the Complaint, the allegations of which may be deemed to be true.

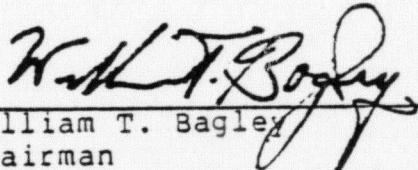
IT IS FURTHER ORDERED that this Complaint and Notice of Hearing shall be served on Respondents Lloyd, Carr & Co., Lloyd Carr Financial Co., James A. Carr and Charles P. LeMieux, III personally or by registered mail forthwith.

In absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecutorial functions in this or any factually related proceedings will be permitted to participate or advise in the decision upon this matter except as witness or counsel in proceedings held pursuant to notice.

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Since this proceeding is not "rule-making", within the meaning of Section 4(c) of the Administrative Procedure Act [5 U.S.C. § 553(c)] it is not deemed to be subject to the provisions of that Section delaying the effective date of any final Commission action.

By the Commission.



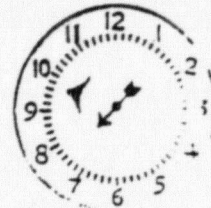
William T. Bagley
Chairman
Commodity Futures Trading
Commission

DATED: February 3, 1977

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FEB 17 '77

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION



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In the Matter of

JAMES A. CARR and
CHARLES P. LEMIEUX, III d/b/a
LLOYD, CARR & CO., a partnership
84 State Street
Boston, Massachusetts 02109

LLOYD CARR FINANCIAL CO.
84 State Street
Boston, Massachusetts 02109

JAMES A. CARR

CHARLES P. LEMIEUX, III

RESPONDENTS

CFTC Docket No. 77-6

MOTION FOR ADOPTION
OF EXPEDITED
PROCEDURES

Pursuant to Rule 10.3 of the Commission's Rules of Practice [17 C.F.R. § 10.3], the Division of Enforcement ("the Division"), moves the Commission for an order suspending certain rules of practice and specifying expedited procedures within which to determine the merits of the allegations in the captioned matter.

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As grounds for this motion the Division states that:

1. On October 1, 1976 James A. Carr and Charles P. LeMieux, III d/b/a Lloyd Carr Financial Co. filed an application with the Commission for registration as a futures commission merchant ("FCM"). This application was returned on October 12, 1976 for failure to enclose a required financial statement and certain biographical data concerning the partners.
2. On January 17, 1977 another application was filed on behalf of Lloyd Carr Financial Co.; the applicant, however, did not meet the minimum financial requirements for an FCM proposing to deal in commodity options because of the disallowance of assets in the name of Lloyd, Carr & Co. which were proffered as assets of the applicant, Lloyd Carr Financial Co.
3. On January 25, 1977 James A. Carr and Charles P. LeMieux, III d/b/a Lloyd, Carr & Co. filed a new application for registration as an FCM.
4. On February 3, 1977 this administrative proceeding was instituted alleging that respondents, since January 17, 1977, had engaged in the sale of options while not registered as an FCM, permitted employees not registered as associated persons to solicit option business on behalf of the respondents,

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failed to keep required records and refused to permit Commission personnel to inspect their books and records.

5. Pursuant to Commission order Lloyd, Carr & Co.'s application for registration will not be granted during the pendency of these proceedings.

6. On February 8, 1977 acting on information that respondents were selling options in violation of the Commission's regulations, a complaint was filed in the United States District Court for the District of Massachusetts seeking a temporary restraining order (TRO) which would have prohibited the respondents from: selling options without being registered as an FCM; failing to keep required records; refusing to permit Commission personnel to inspect their books and records; and for other ancillary relief.

7. After a hearing, the Court refused to grant the TRO. The court's reasons included, among others, the Commission's failure to act on Lloyd, Carr & Co.'s pending FCM application, the absence of any time period within which the Commission was required to act on the application, and the supposedly irreparable harmful effect on Lloyd, Carr & Co.'s business if the Court ordered the cessation of business and the Commission subsequently granted its application for registration as an FCM. The applicant

continues to solicit and accept monies and orders for the purchase of commodity options although unregistered and although unsuccessful in persuading the United States District Court and the United States Court of Appeals in New York to enjoin the implementation of the Commission's option regulations at issue in this case.

8. In fairness to the applicant, Lloyd, Carr & Co., and in recognition of the Commission's obligation to protect the public the Commission should order a prompt and expeditious hearing on the allegations in the Complaint in order to determine whether or not to grant or refuse Lloyd, Carr & Co.'s application and whether or not to impose sanctions on the other respondents. A prompt hearing will not prejudice any party and will serve the ends of justice.

9. The Division expects the hearing in this matter will not be lengthy or result in a voluminous record. The allegations set forth in the complaint present clear, narrow issues which are capable of speedy resolution and which should not require extensive testimony or the use of numerous or complicated documents. Moreover, respondents in large measure are already aware of the underlying evidence to be used by the Division as a result of the documents filed in federal court in Boston on February 8, 1977.

10. A prompt hearing and decision on the allegations in the complaint will place in equipoise the rights of the respondents and the rights of the investing public.

11. For the reasons set forth above the Division submits that the due and timely execution of the Commission's functions necessitates that the Commission should order that evidence be taken by an administrative law judge and that the entire record be certified to the Commission for decision without requiring an initial decision.

II

In view of the foregoing the Division moves the Commission to suspend Subparts A through H of Part 10 of its Rules of Practice [17 C.F.R. §§10.1-10.108] and Order ^{*}/ that:

a. Respondents shall file any opposition to this motion within 5 calendar days after receipt of the Division's Motion for Adoption of Expedited Procedures, in accordance with the provisions of Rule 10.26 of the Commission's Rules of Practice [17 C.F.R. § 10.26];

b. The hearing be conducted by an administrative law judge designated by the Chief Administrative Law Judge;

^{*}/ To implement the expedited procedures the Division requests the Commission to issue one order to set a time within which respondents may answer the Division's motion and thereafter a second order to set the expedited time schedule.

c. The matter be set for hearing on February 28, 1977 and continued without interruption until completed at such place as the Administrative Law Judge shall designate;

d. The administrative law judge shall have authority to: (1) administer oaths and affirmations, (2) issue subpoenas, (3) rule on offers of proof, (4) receive relevant evidence, (5) examine witnesses, (6) regulate the course of the hearing, (7) hold prehearing conferences, (8) consider and rule upon all motions, (9) take such action as is just or appropriate if a party or agent of a party fails to comply with an order issued by the administrative law judge and (10) take any other action required to give effect to the Rules of Practice applicable to these expedited procedures all in accordance with the provisions of Rule 10.8 of the Commission's Rules of Practice [17 C.F.R. § 10.8];

e. The hearing be conducted in accordance with the rules governing appearances in adjudicatory proceedings, stipulations, appearances at hearings, public hearings, record of hearings, conduct of hearings, evidence, subpoenas and obtaining default orders, all as provided for in Rules 10.11, 10.43, 10.62, 10.64-10.68 and 10.93 of the Commission's Rules of Practice

[17 C.F.R. §§ 10.11, 10.43, 10.62, 10.64-10.68, 10.93], and the Division shall comply prior to February 28, 1977 with the provision of Rule 10.42(b) [17 C.F.R. § 10.42(b)] regarding discovery of investigatory materials;

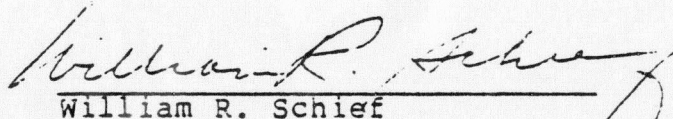
f. Immediately upon completion of the evidentiary hearing the presiding officer shall certify and transmit to the Commission the entire record of the proceedings in this matter;

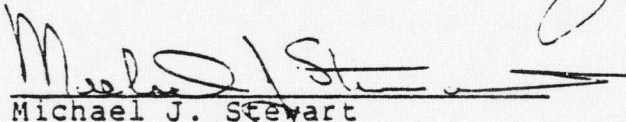
g. Complainant and Respondents shall have 3 calendar days after completion of the evidentiary hearing in which to submit to the Commission Proposed Findings of Fact, Conclusions of Law and legal briefs in support thereof; and

h. Any request for modification of this Order shall be made directly to the Commission.

WHEREFORE, the above premises considered, the Division requests the Commission to order expedited procedures in this matter in accordance with these proposed in Section II of this motion.

Respectfully submitted,


William R. Schief


Michael J. Stewart


Richard A. Levie

Dated: February 16, 1977

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing motion for adoption of expedited procedures was mailed, postage prepaid, this 16th day of February, 1977 to:

James A. Carr and Charles P. LeMieux d/b/a
Lloyd, Carr & Co., a partnership
84 State Street
Boston, Massachusetts 02109

Lloyd Carr Financial Co.
84 State Street
Boston, Massachusetts 02109

Mr. James A. Carr
6 Revere Street
Hull, Massachusetts 02045

Mr. Charles P. LeMieux, III
c/o Lloyd, Carr, Canada Ltd.
Suite 302
3 Place Ville Marie
Montreal, Canada

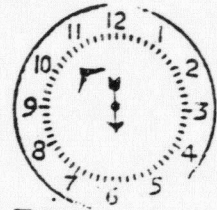
Charles J. Hecht, Esq.
Suite 1760
60 East 42nd Street
New York, New York 10017

Richard A. Levie
Richard A. Levie

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FEB 23 '77

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION



RECEIVED
CFTC
HEARING CLERK

In the Matter of

JAMES A. CARR and
CHARLES P. LEMIEUX, III d/b/a
LLOYD, CARR & CO., a partnership
84 State Street
Boston, Massachusetts 02109

LLOYD CARR FINANCIAL CO.
84 State Street
Boston, Massachusetts 02109

JAMES A. CARR

CHARLES P. LEMIEUX, III

RESPONDENTS

CFTC Docket No. 77-6

Certificate of Service

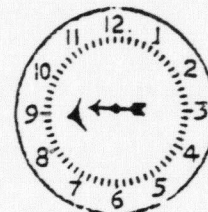
LESLIE A. BLAU, an attorney admitted to practice in the State of New York, hereby certifies that at about 1:00 p.m. on February 17, 1977, he personally served two (2) copies each of the within Motion For Adoption Of Expedited Procedures and Order upon Haig Costikyan, an associate of Charles J. Hecht, at the law offices of Mr. Hecht, Suite 1760, 60 E. 42nd St., New York, New York.

Leslie A. Blau

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UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

FEB 17 77



RECEIVED
CFTC
HEARING CLERK

In the Matter of

JAMES A. CARR and
CHARLES P. LemIEUX, III d/b/a
LLOYD, CARR & CO., a partnership
84 State Street
Boston, Massachusetts 02109

LLOYD CARR FINANCIAL CO.
84 State Street
Boston, Massachusetts 02109

JAMES A. CARR

CHARLES P. LemIEUX, III

RESPONDENTS

CFTC Docket No. 77-6

ORDER ESTABLISHING TIME
FOR RESPONDENTS TO ANSWER
THE DIVISION OF ENFORCEMENT'S
MOTION FOR ADOPTION OF
EXPEDITED PROCEDURES

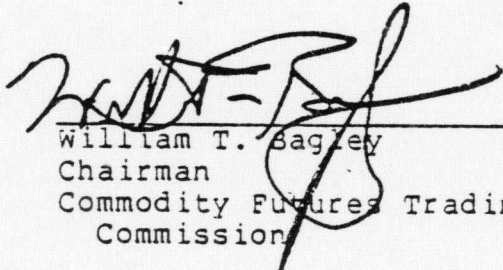
ORDER

On February 16, 1977 the Division of Enforcement filed a motion requesting adoption of expedited procedures in this case. The reasons set forth in the motion are persuasive that the due and timely execution of the Commission's functions necessitates in the first instance immediate resolution of the question of whether or not expedited procedures should be adopted in this matter.

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Accordingly, it is ORDERED that respondents shall have 5 calendar days following receipt of this ORDER and the Division's motion for adoption of expedited procedures in which to answer or otherwise respond to the Division's motion.

By the Commission.



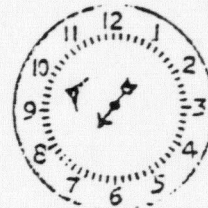
William T. Bagley
Chairman
Commodity Futures Trading
Commission

Dated: February 16, 1977

000020

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

FEB 22 '77



RECEIVED
CFTC
HEARING CLERK

In the Matter of

JAMES A. CARR and
CHARLES P. LeMIEUX, III d/b/a
LLOYD, CARR & CO., a partnership
84 State Street
Boston, Massachusetts 02109

LLOYD CARR FINANCIAL CO.
84 State Street
Boston, Massachusetts 02109

JAMES A. CARR

CHARLES P. LeMIEUX, III

RESPONDENTS

CFTC Docket No. 77-6

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing order establishing time for respondents to answer the Division of Enforcement's motion for adoption of expedited procedures were mailed, postage prepaid, this 17th day of February, 1977 to:

James A. Carr and Charles P. LeMieux d/b/a/
Lloyd, Carr & Co., a partnership
84 State Street
Boston, Massachusetts 02109

Lloyd Carr Financial Co.
84 State Street
Boston, Massachusetts 02109

Mr. James A. Carr
6 Revere Street
Hull, Massachusetts 02045

000021

Mr. Charles P. LeMieux, III
c/o Lloyd, Carr, Canada Ltd.
Suite 302
3 Place Ville Marie
Montreal, Canada

Charles J. Hecht, Esquire
Suite 1760
60 East 42nd Street
New York, New York 10017

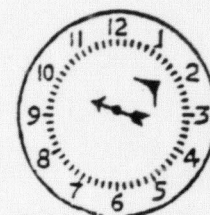
Richard A. Levie

Richard A. Levie
Attorney
Division of Enforcement

000022

FEB 25 77

UNITED STATES OF AMERICA
before the
COMMODITY FUTURES TRADING COMMISSION



RECEIVED
CFTC
HEARING CLERK

In the Matter of

JAMES A. CARR and
CHARLES P. LeMIEUX III, d/b/a
LLOYD, CARR & CO., a partnership
84 State Street
Boston, Massachusetts 02109

LLOYD, CARR FINANCIAL CO.
84 State Street
Boston, Massachusetts

JAMES A. CARR

CHARLES P. LeMIEUX III,

Respondents.

ANSWER

CFTC Docket No. 77-6

Respondents James A. Carr and Charles P. LeMieux III, d/b/a Lloyd, Carr & Co., a partnership, Lloyd, Carr Financial Co., James A. Carr and Charles P. LeMieux III (sometimes hereinafter collectively referred to as the "Respondents"), by Charles J. Hecht, their attorney, for their Answer to the Complaint and Notice of Hearing pursuant to Sections 6(b), 6(c), 8a(2) and 8a(3) of the Commodity Exchange Act, as amended (the "Act"), respectfully allege:

I

Deny each and every allegation contained in paragraph I except as follows:

1. Deny knowledge or information sufficient to form a belief as to the contents of the official files of the

000023

Commodity Futures Trading Commission (the "Commission").

2. Admit that shortly after it commenced operations it filed an application as a commodity trading advisor ("CTA") and that on or about November 19, 1976 Lloyd, Carr Financial Co. d/b/a Lloyd, Carr & Co. became registered with the Commission as a CTA and that it is still so registered.

3. Admit that on January 25, 1977, Lloyd, Carr & Co. filed with the Commission an amended application for registration as a futures commission merchant ("FCM") which application is still pending.

4. Admit that Lloyd, Carr & Co. and Lloyd, Carr Financial Co. are partnerships, the principals of which are James A. Carr and Charles P. LeMieux III.

5. Admit that James A. Carr is not registered with the Commission as an associated person or registered individually in any other capacity but agrees to voluntarily register as an associated person although not required since he does not sell or directly supervise persons engaged in offers and sales of London commodity options.

6. Admit that Charles P. LeMieux III is registered with the Commission as an associated person.

II

7. Denies, on information and belief, the allegations contained in the preamble of paragraph II.

8. Denies the allegations contained in paragraphs A, B, C, D, E and F thereof.

9. The statements contained in paragraph III do not

require a response at this time, but reference is made to the affirmative defenses hereinafter set forth.

III

As and for Respondents' First Affirmative Defense

A. That the investigatory proceedings by the staff of the Commission, through its Division of Enforcement, show prejudgment towards these Respondents, constituting a denial of due process of law and equal protection under the laws, as guaranteed by the Fifth Amendment to the Constitution of the United States, to wit:

(i) Omitting to allege or disclose in the Complaint and Notice of Hearing (the "Complaint") material facts necessary to make the allegations therein not false or misleading in the following specific instances:

(a) That Paragraph I A omits to state that Lloyd, Carr Financial Co. registered as a CTA pursuant to an interpretive release issued by the Office of General Counsel of the Commission in October, 1975, interpreting the Act and the regulations then promulgated thereunder as requiring dealers in commodity options to so register.

(b) That the Complaint omits to state that there is no record of any complaints of customers of the Respondents nor is the Commission in possession of any facts or evidentiary material on which a proceeding for the revocation of the registration of Lloyd, Carr Financial Co. as a CTA could be based.

(c) That the Complaint omits to state that on January

20 and January 21, 1977 staff auditors of the Commission examined the books and records of the Respondents, and advised Respondents and their counsel at the conclusion of their examination and thereafter that the said Respondents more than satisfied the minimum financial requirements provided under Regulation 1.17 and related requirements.

(d) That the Complaint omits to state that Lloyd, Carr Financial Co. filed with the Commission an application for registration as an FCM on or about October 1, 1976 and that said application was returned without any reason given for the return thereof and it was only through the efforts of respondents that the staff of the Commission finally furnished comments in the latter part of December, 1976.

(e) That the Complaint omits to state that the respondents have attempted to comply with all reasonable requests of the staff.

(f) That the Complaint and Notice of Hearing omits to state that the application of Lloyd, Carr Financial Co. was amended to the name of Lloyd, Carr & Co. at the request of the Commission.

As and for Respondents' Second Affirmative Defense

B. That this administrative proceeding charges these Respondents unjustly and without any indication of their differing level of responsibility, vis-a-vis persons or companies engaged in a business comparable to that of the Respondents, constituting an illegal, discriminatory and selection prosecution of these Respondents and representing

a denial of due process of law and equal protection under the laws as guaranteed by the Fifth Amendment to the Constitution of the United States.

As and for Respondents' Third Affirmative Defense

C. That Section 32.2(a) of the rules and regulations promulgated by the Commission pursuant to Section 4c(b) of the Act violates the provisions of 5 U.S.C. §706(a) and as attempted to be applied by the Commission in this proceeding denies the Respondents due process of law and equal protection under the laws as guaranteed by the Fifth Amendment to the Constitution of the United States, to wit:

(i) Section 32.3(a) provides for registration as an FCM on or before January 17, 1977, rather than filing for such registration on or before such date, in order to engage in the business of commodity options.

(ii) The staff of the Commission failed to give proper notice pursuant to 5 U.S.C. §551 et. seq. as to a date for the filing of an application for registration as an FCM.

(iii) The Commission has failed to expeditiously process the application of Lloyd, Carr Financial Co. for registration as an FCM and neither the Act nor the rules and regulations promulgated thereunder provide any time in which the Commission must act.

(iv) The Commission has failed expeditiously to process the applications of employees of the partnership Respondents for registration as associated persons, and neither the Act nor the rules and regulations promulgated thereunder provide

any time in which the Commission must act.

As and for Respondents' Fourth Affirmative Defense

D. The Complaint omits to state that all persons who were in the employ of Lloyd, Carr & Co. and Lloyd, Carr Financial Co. prior to January 17, 1977 who were engaged in the solicitation or acceptance of customers' orders as at January 16, 1977 filed applications prior to January 17, 1977 for registration as associated persons which applications are still pending.

As and for Respondents' Fifth Affirmative Defense

F. The Complaint omits to state that on January 20 and January 21, 1977 staff auditors of the Commission examined the books and records of the partnership Respondents, which audit disclosed that the minimum financial requirements under Regulation 1.17 were exceeded. In spite of the results of such examination and a conceded absence of any customer complaints or other record of violations, the Division of Enforcement on January 27, 1977 demanded as a condition of registration of the respondents as FCMs unlimited access to all of the respondents' books and records including customer names and addresses for the purpose of destroying respondents' business.

The respondents, in an attempt to satisfy the Division of Enforcement while preventing the complete destruction of their business, volunteered to "sacrifice" 15 customer names in a random sampling and to provide copies of all marketing literature, which offer was categorically rejected. The

attempted actions of the Division of Enforcement are in violation of the respondents' rights under the Fourth Amendment to the Constitution of the United States.

As and for Respondents' Sixth Affirmative Defense

G. The Complaint fails as a matter of law to state a cause of action pursuant to Section 6(b) of the Act.

As and for Respondents' Seventh Affirmative Defense

H. The Complaint fails as a matter of law to state a cause of action pursuant to Section 6(c) of the Act.

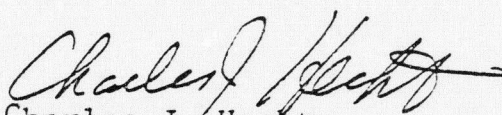
As and for Respondents' Eighth Affirmative Defense

I. The Complaint fails as a matter of law to state a cause of action pursuant to Section 8(a)(2) of the Act.

As and for Respondents' Ninth Affirmative Defense

J. The Complaint fails as a matter of law to state a cause of action pursuant to Section 8(a)(3) of the Act.

WHEREFORE, Respondents demand judgment dismissing with prejudice the Complaint and Notice of Hearing instituted against them and demand an order directing that the application of Lloyd, Carr Financial Co. d/b/a Lloyd, Carr & Co. as an FCM be accepted and approved.

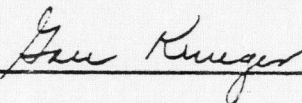

Charles J. Hecht
Attorney for Respondents
60 East 42d Street - Suite 1760
New York, New York 10017
212/490-3232

Dated: New York, New York
February 23, 1977

CERTIFICATE OF SERVICE

I certify that on February 23, 1977, two copies of
the Answer of the Respondent were mailed, postage prepaid,
first class, to:

Richard A. Levie
Commodity Futures Trading Commission
2033 K Street, N.W.
Washington, D.C. 20581

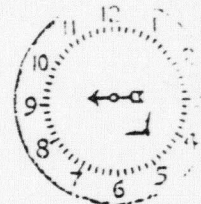


Gale Krueger

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UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

MAR 2 '77



RECEIVED
CFTC
HEARING CLERK

In the Matter of

JAMES A. CARR and
CHARLES P. LEMIEUX, III d/b/a
LLOYD, CARR & CO., a partnership
84 State Street
Boston, Massachusetts 02109

LLOYD CARR FINANCIAL CO.
84 State Street
Boston, Massachusetts 02109

JAMES A. CARR

CHARLES P. LEMIEUX, III

RESPONDENTS

CFTC Docket No. 77-6

ORDER ADOPTING
EXPEDITED PROCEDURES

ORDER

On February 16, 1977 the Division of Enforcement filed a motion requesting adoption of expedited procedures in this case. On February 23, 1977 respondents filed a memorandum of points and authorities in opposition to the motion for adoption of expedited proceedings.

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Upon consideration of the Division's motion, respondents' opposition thereto and the other documents in the Commission's public file in this matter the Commission finds that:

- (1) the issues framed by the pleadings in this matter are clear, narrow and capable of speedy resolution;
- (2) respondents are alleged to have been soliciting and accepting orders and monies for commodity option transactions since January 17, 1977 while not registered with the Commission;
- (3) the public is entitled to be protected against unregistered persons and firms soliciting and accepting orders and monies for commodity option transactions in violation of the Commission's regulations;
- (4) respondents and the public are entitled to a prompt decision on the question of whether or not the application of Lloyd, Carr & Co. for registration as a futures commission merchant should be granted or refused;
- (5) respondents have not alleged any inability to adequately prepare their defenses to the allegations in the Complaint by the adoption of expedited procedures; and
- (6) respondents have been on notice since February 17, 1977 that expedited procedures were required by the Division and being considered by the Commission.

The Commission has determined that no party to this proceeding will be prejudiced and that the ends of justice will be served by the adoption of expedited procedures in this matter. Accordingly, IT IS ORDERED that subparts A through H of Part 10 of the Commission's Rules of Practice [17 C.F.R. §§10.1-10.108] are waived; and

IT IS FURTHER ORDERED that:

a. The hearing in this matter be conducted by an administrative law judge designated by the Chief Administrative Law Judge;

b. The matter be set for hearing on March 8, 1977 and continued without interruption until completed at such place as the Administrative Law Judge shall designate;

c. The Administrative Law Judge shall have authority to: (1) administer oaths and affirmations, (2) issue subpoenas, (3) rule on offers of proof, (4) receive relevant evidence, (5) examine witnesses, (6) regulate the course of the hearing, (7) hold prehearing conferences, (8) consider and rule upon all motions, (9) take such action as is just or appropriate if a party or agent of a party fails to comply with an order issued by the administrative law judge and (10) take any other action required to give effect to the Rules of Practice applicable to these expedited procedures, all in accordance with the provisions of Rule 10.8 of the Commission's Rules of Practice [17 C.F.R. § 10.8];

d. The hearing be conducted in accordance with the rules governing appearances in adjudicatory proceedings, stipulations, appearances at hearings, public hearings, record of hearings, conduct of hearings, evidence, subpoenas and obtaining default orders, all as provided for in Rules 10.11, 10.43, 10.62, 10.64-10.68 and 10.93 of the Commission's Rules of Practice [17 C.F.R. §§ 10.11, 10.43, 10.62, 10.64-10.68, 10.93], and the Division shall comply, prior to commencement of the hearing, with the provision of Rule 10.42(b) [17 C.F.R. § 10.42(b)] regarding discovery of investigatory materials;

e. Immediately upon completion of the evidentiary hearing the presiding officer shall certify and transmit to the Commission for decision the entire record of the proceedings in this matter;

f. The Division and the Respondents shall have 3 calendar days after completion of the evidentiary hearing in which to file with the Commission Proposed Findings of Fact, Conclusions of Law and legal briefs in support thereof; and

g. Any request for modification of this
Order shall be made directly to the Commission.

By the Commission pursuant to Senior Commissioner Authority
(Chairman BAGLEY in consultation with Commissioner DUNN; Commissioner
MARTIN, although not present, participated in the decision by
telephone).



William T. Bagley
Chairman
Commodity Futures Trading
Commission

Dated: March 2, 1977

000025



COMMODITY FUTURES TRADING COMMISSION

2033 K Street, N.W., Washington, D.C. 20581

March 4, 1977

CERTIFIED RETURN REQUESTED

Mr. Charles J. Hecht
Attorney for Respondents
60 East 42nd Street
Suite 1760
New York, New York 10017

Re: In the Matter of James A. Carr and Charles P. Lemieux, III,
et al. - CFTC Docket No. 77-6

Dear Mr. Hecht:

Enclosed please find a copy of the Judge's Notice of Hearing, which has been received and filed with this office in the above-entitled proceeding.

For your information copies of the transcript of testimony taken at the Hearing will not be available for distribution through this office. If you wish to purchase a copy, arrangements may be made with the reporter at the Hearing.

Very truly yours,

Liana Donato for...

Deedra K. Jones
Hearing Clerk
Office of Hearings and Appeals

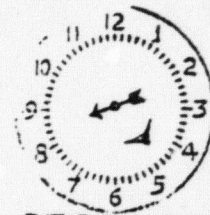
Enclosure

bcc: Dick Lavie, ENF, w/encl.
Jeff Milton, OGC, w/encl.
Linda Pedon, OED, w/encl.
ddonato:3/4/77

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MAR 3 77

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION



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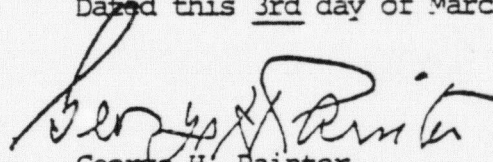
In the Matter of :
JAMES A. CARR, ET AL. : CFTC Docket No. 77-6
Respondents :

NOTICE OF HEARING

By Order of March 2, 1977, the Commission set this matter for hearing on March 8, 1977, the hearing to be conducted under formally adopted expedited procedures. Therefore, the hearing in this matter will commence at 10:00 a.m., March 8, 1977, at the John W. McCormick Post Office-Courthouse Building, Devonshire Street, Boston, Massachusetts, Room 932.

For more information concerning the issues of this proceeding, the interested parties are referred to the docket of this proceeding which is maintained at the Office of the Hearing Clerk, Commodity Futures Trading Commission, Washington, D.C. 20581.

Dated this 3rd day of March, 1977


George H. Painter
Administrative Law Judge

000007

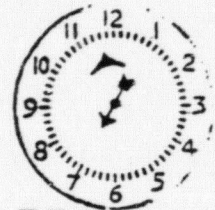
CHARLES J HECHT
60 E 42 ST SUITE 1760
NEW YORK NY 10017

western union Mailgram



2-017212A062003 03/03/77 ICS IPMOCND. NYK WSHB
04174 MGM DC NEWYORK NY 300 03-03 330P EDT

MAR 4 77



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HEARING CLERK

JUDGE GEORGE H PAINTER
2033 K STREET N.W.
WASHINGTON DC 20581

RE: CFTC NO. 77-6 (LLOYD, CARR)

RESPONDENTS ABOVE PROCEEDING HAVE PETITIONED U.S. COURT OF APPEALS, FIRST CIRCUIT FOR REVIEW AND TO SET ASIDE ORDER FOR EXPEDITED PROCEDURES ENTERED MARCH 2, 1977 AND SERVED MARCH 3, 1977. RESPONDENTS MOVE COMMISSION FOR RECISSION OF SAID ORDER OR STAY PENDING DISPOSITION OF APPEAL ON FOLLOWING GROUNDS:

1. ORDER ADOPTING EXPEDITED PROCEDURES SETTING HEARING MARCH 8, 1977 AND TO CONTINUE WITHOUT INTERRUPTION VIOLATES RULE 10.61 RULES OF PRACTICE SINCE UNDERSIGNED COUNSEL FOR RESPONDENTS IN NECESSARILY ENGAGED MARCH 8, 1977 IN U.S. COURT OF APPEALS, SECOND CIRCUIT IN BACOC V. CFTC (77-4054) AND IS ENGAGED ON MARCH 10, 1977 IN ANOTHER ACTION INVOLVING THE CFTC AND ANOTHER MATTER BEFORE THE SUPREME COURT, NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT ON SAME DATE. UNDERSIGNED ALSO HAS SET COURT COMMITMENTS ON MARCH 11, 15, 16 AND 21-25.

2. CERTAIN KEY WITNESSES FOR RESPONDENTS CANNOT BE CONTACTED ON SUCH SHORT NOTICE AND THIS IS CLEARLY INSUFFICIENT TIME TO PREPARE FOR A FULLY LITIGATED PROCEEDING.

3. SAID ORDER VIOLATES RULE 10.61 RULES OF PRACTICE, 5 U.S.C. 551 ETC., AND 5TH AMENDMENT U.S. CONSTITUTION IN THAT STAFF KNOWS OF UNDERSIGNED'S SCHEDULE AND IS ATTEMPTING KANGAROO COURT TACTICS TO FORECLOSE RESPONDENTS FROM PROPER REPRESENTATION BY COUNSEL OF THEIR CHOICE AND IN THAT THERE ARE NO ALLEGATIONS IN COMPLAINT BEARING ON PUBLIC INTEREST OR JUSTIFYING ABROGATION OF RESPONDENTS' DUE PROCESS RIGHTS.

BECAUSE OF SEVERE TIME LIMITATIONS REQUEST TELEGRAPHIC NOTICE BEFORE NOON MARCH 4, 1977.

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IF NOT RECEIVED ASSUME APPLICATION DENIED.

CHARLES J HECHT
ATTORNEY FOR RESPONDENTS

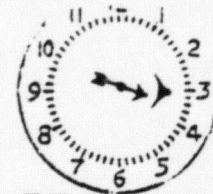
16:17 EST

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MAR 4 '77

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION



RECEIVED
CFTC

In the Matter of :
:
JAMES A. CARR and :
CHARLES P. LeMieux, III d/b/a :
LLOYD, CARR & CO., a partnership :
84 State Street :
Boston, Massachusetts 02109 :
:
LLOYD CARR FINANCIAL CO. :
84 State Street :
Boston, Massachusetts 02109 :
:
JAMES A. CARR :
:
CHARLES P. LeMIEUX, III :
:
RESPONDENTS :

CFTC Docket HEARING 76-6 ERK
ORDER DENYING STAY OR
RECISION OF EXPEDITED
PROCEDURES

ORDER

At 11:35 a.m. on March 4, 1977 the Commission received a telegraphic motion filed by respondents asking the Commission to rescind or stay its order of expedited procedures in this matter. The Division of Enforcement has filed an opposition to this motion.

Upon consideration of respondents' motion, the Division's opposition thereto and all documents contained in the Commission's public file in this matter, it is this 4th day of March, 1977

ORDERED:

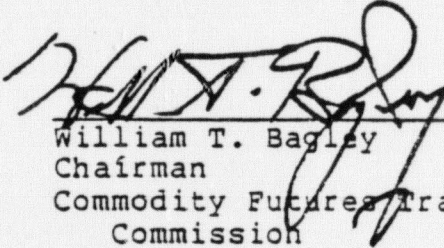
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1. that, in recognition of the obligation of respondents' present counsel to appear before the United States Court of Appeals for the Second Circuit on March 8, 1977, the hearing in this matter will commence on March 9, 1977 at a location designated by the Administrative Law Judge and continue without interruption until completion;

2. that, in all other respects respondents' motion is denied; and

3. that, with the exception of the change in hearing date until March 9, 1977 the Commission reaffirms the procedures adopted in its Order of March 2, 1977 including that portion of the Order directing respondents to file all motions in this matter with the Commission.

By the Commission pursuant to Senior Commissioner Authority (Chairman BAGLEY, Commissioner DUNN; Commissioner MARTIN participated by telephone).



William T. Bagley
Chairman
Commodity Futures Trading
Commission

Dated: March 4, 1977

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MAR 11 '77

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION



RECEIVED
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HEARING CLERK

In the Matter of :
:
JAMES A. CARR and :
CHARLES P. LeMieux, III d/b/a :
LLOYD, CARR & CO., a partnership :
84 State Street :
Boston, Massachusetts 02109 :
:
LLOYD CARR FINANCIAL CO. :
84 State Street :
Boston, Massachusetts 02109 :
:
JAMES A. CARR :
:
CHARLES P. LeMIEUX, III :
:
RESPONDENTS :
:

CFTC Docket No. 77-6
ORDER ADJOURNING HEARING
ON MARCH 14, 1977

ORDER

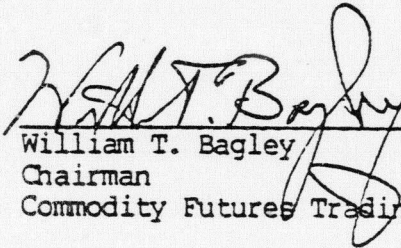
At 11:56 a.m. on March 11, 1977 the Commission received a telegraphic motion filed by respondents asking the Commission to adjourn the hearing in this matter on March 14, 1977 only. The Division of Enforcement does not oppose this motion.

Upon consideration of respondents' motion, the Division's lack of opposition thereto and all documents contained in the

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Commission's public file in this matter, it is this 11th day of March, 1977 ORDERED that the hearing in this matter be adjourned on March 14, 1977 to resume on March 15, 1977.

By the Commission (Chairman BAGLEY, Vice-Chairman RAINBOLT and Commissioner MARTIN). Commissioners SEEVERS and DUNN not participating



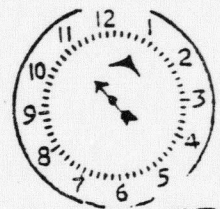
William T. Bagley
Chairman
Commodity Futures Trading Commission

Dated: March 11, 1977

000043

MAR 1 1977

UNITED STATES OF AMERICA
before the
COMMODITY FUTURES TRADING COMMISSION



RECEIVED
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HEARING CLERK

In the Matter of

JAMES A. CARR and CHARLES P.
LEMIEX III, d/b/a LLOYD, CARR
& CO., a partnership
84 State Street
Boston, Massachusetts 02109

LLOYD CARR FINANCIAL CO.
84 State Street
Boston, Massachusetts 02109

JAMES A. CARR

CHARLES P. LEMIEUX III,

Respondents.

APPLICATION FOR INTER-
LOCUTORY APPEAL PURSUANT
TO SECTION 10.101 OF THE
RULES OF PRACTICE

CFTC Docket No. 77-6

Application By:

Respondents.

Date, Time and Place
of Hearing:

As determined by Administrative Law
Judge George H. Painter.

Supporting Papers:

Memorandum of Points and Authorities.

Relief Requested:

Certification to the Commission that:
(i) the rulings sought to be appealed
from involve a controlling question of
law or policy; (ii) an immediate
appeal may materially advance the
ultimate resolution of the issues in
the proceeding; and (iii) subsequent
reversal of the ruling would cause
unnecessary delay and expense for the
parties and pending a ruling on the
foregoing an order of the Commission
staying all proceedings pursuant to
Rule 10.101(c) at the close of the
Division of Enforcement's case and for
such other and further relief as to

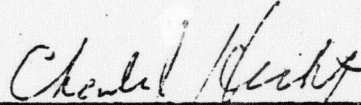
2 copies
served
by hand
on
Richard Levine
[Signature]

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the Commission appears just and proper
under the circumstances.

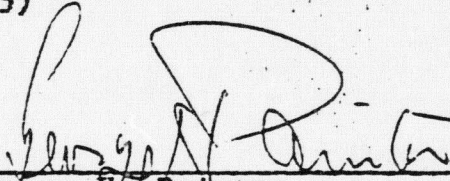
Dated: Boston, Massachusetts
March 11, 1977

Respectfully submitted,



Charles J. Necht
Attorney for Respondents
Suite 1760
60 East 42d Street
New York, New York 10017
(212) 490-3232

The foregoing application is hereby certified to the Commission
pursuant to Rule 10.101(a)(5)

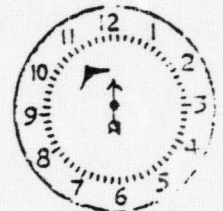


George H. Painter
Administrative Law Judge

000045

MAR 21 '77

UNITED STATES OF AMERICA
before the
COMMODITY FUTURES TRADING COMMISSION



RECEIVED
CFTC
HEARING ROOM

In the Matter of

JAMES A. CARR and CHARLES P.
LEMIEUX III, d/b/a LLOYD, CARR
& CO., a partnership
84 State Street
Boston, Massachusetts 02109

LLOYD, CARR FINANCIAL CO.
84 State Street
Boston, Massachusetts 02109

JAMES A. CARR

CHARLES P. LEMIEUX III.

Respondents.

APPLICATION PURSUANT TO SEC-
TION 10.101 OF THE RULES OF
PRACTICE FOR INTERLOCUTORY
APPEAL OF THE RULING OF THE
ADMINISTRATIVE LAW JUDGE DENY-
ING THE RESPONDENTS' MOTION
FOR DIRECTED VERDICT, AND FOR
ORAL ARGUMENT BEFORE THE COM-
MISSION.

CFTC Docket No. 77-6

Application By:

Respondents.

Date, Time and Place
of Hearing:

As determined by Administrative Law Judge George H.
Painter, at the close of the case of the Division
of Enforcement.

Supporting Papers:

Memorandum of Points and Authorities.

Relief Requested:

I. Certification to the Commission that : (i)
the Respondents' Motion for Directed Verdict involves
controlling questions of law or policy; (ii) an im-
mediate appeal may materially advance the ultimate
resolution of the issues in the proceeding; and
(iii) subsequent reversal of the ruling would cause
unnecessary delay and expense for the parties.

II. An order of the Administrative Law Judge or of
the Commission that the administrative proceeding
be stayed, pending the disposition of this Interloc-
utory Appeal.

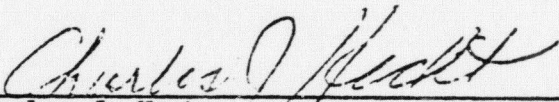
III. An order of the Commission directing oral
argument on this Interlocutory Appeal, at such time
and place as the Commission shall determine.

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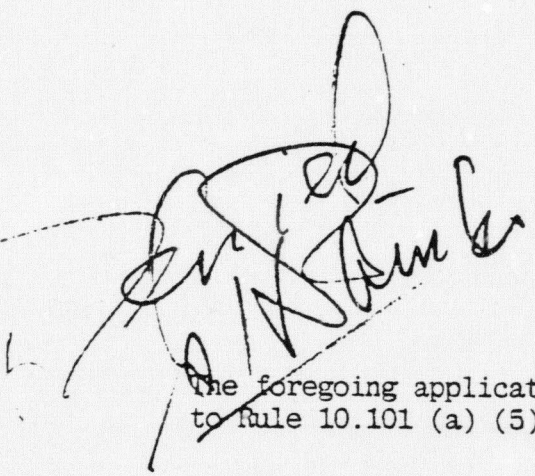
IV. Such other and further relief as to the Commission appears just and proper under the circumstances.

New York, New York
Dated: ~~Boston, Massachusetts~~
March 20, 1977

Respectfully submitted,



Charles J. Hecht,
Attorney for Respondents
Suite 1760
60 East 42nd Street
New York, New York 10017
(212) 490-3232


The foregoing application is hereby certified to the Commission pursuant to Rule 10.101 (a) (5)

George H. Painter
Administrative Law Judge

UNITED STATES OF AMERICA
before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of

JAMES A. CARR and CHARLES P.
LeMIEUX III, d/b/a LLOYD, CARR
& CO., a partnership
84 State Street
Boston, Massachusetts 02109

LLOYD, CARR FINANCIAL CO.
84 State Street
Boston, Massachusetts 02109

JAMES A. CARR

CHARLES P. LeMIEUX III,

Respondents.

MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF THE APPLICA-
TION FOR INTERLOCUTORY
APPEAL

CFTC Docket No. 77-6

I. INTRODUCTION

This Memorandum is submitted in support of an application for interlocutory appeal of the ruling of the Administrative Law Judge denying the Respondents' Motion for Directed Verdict. The issues raised on this application are the same as those raised in the Respondents' Motion to Dismiss, dated March 9, 1977, and the Memorandum submitted in support thereof which is incorporated herein by reference.

There are three allegations in support of the claim that the registration of Lloyd, Carr & Co. ("Lloyd, Carr") as a futures commission merchant ("FCM") should be denied and other sanctions should be imposed: (i) that the Respondents and employees thereof have engaged in transactions in commodity options subsequent to January 17, 1977 while not registered

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as an FCM, or Associated Persons (APs); (ii) that the Respondents have failed to keep certain records required by the regulations promulgated by the Commission; (iii) and that the Respondents denied Commission personnel access to their books and records. The evidence presented in the administrative hearing by the Division of Enforcement is insufficient in law to establish a cause of action based upon any of the foregoing allegations.

II. ARGUMENT

A. The Failure to Be Registered Was Not Due to Any Acts of The Respondents

The principal allegation in support of the drastic relief requested is that the applicant transacted business after January 17, 1977 although not yet registered. Rephrased, Respondents should have ceased operations on January 17, 1977 without their "day in court," i.e., at the conclusion of an administrative proceeding conducted in accordance with due process, the Administrative Procedure Act and the CFTC's Rules of Practice. It is not disputed that the partnership Respondents' original application was timely filed (October 1, 1976) and the amendments thereto were also timely filed. There is no allegation that applicant is violating the anti-fraud rules or that the continuation of their business is contrary to the public interest. The concept that the integrity of the registration provisions, standing alone, under circumstances

such as these, is sufficient to constitute "other good cause shown" under Section 8(a)(2)(B) of the Act or 40 Fed. Reg. 28125 (July 3, 1975) has been rejected. CFTC v. British American Commodity Options Corp. (CCH Fed. Comm. Fut. L. Rep. ¶20,224 (S.D.N.Y. 1976). In that case, the principal of the applicant, John Forma, came within the specified potential grounds for denial in Section 8(a)(2)(B)(i), which is not the case with respect to Messrs. Carr and LeMieux. Thus, to rely upon the failure of a thriving, legitimately conducted enterprise to immediately cease operations without its "day in court" as a basis for putting them out of business is clearly insufficient as a matter of law. Judge Hunt's ruling in In the Matter of British American Commodity Options Corp., CFTC Docket No. 76-15 is in accord. Thus, this cause of action is clearly insufficient. Furthermore, the legality and constitutionality of Section 32.3 is presently before the Second Circuit Court of Appeals and the undersigned is confident that the staff advised the Commission of the panels' comments and questions relating thereto at oral argument. Respondents' due process contentions relating to the expedited procedure adopted by the CFTC under the circumstances of this case are set forth in its papers filed in 77 Civ 666 (D. Mass.), which is separate and apart from this motion for a directed verdict.

The staff has conceded on the record that Lloyd, Carr satisfied the minimum financial requirements and that, as a result of the acceptance of the prior CTA application, Messrs. Carr and LeMieux, the principals of Respondent clearly passed the fitness criteria. Under the CFTC's release published in the Federal Register on January 19, 1977 at page 7 FCM

registration should have been granted. In addition, the staff's letter to Lloyd, Carr dated January 18, 1977 stated that the Form 1FR filed by applicant was acceptable and need not be revised. It is undisputed the audit staff visited the premises on January 20, 1977 and February 21, 1977 and had full access to the Respondents' books and records and advised Respondents and their counsel on January 20, 21 and 26 that as to their area of responsibility, the partnership Respondent should be registered.

In short, as at January 17, 1977 and clearly as of January 21, 1977 Respondent in all respects qualified as an FCM. Between January 19, 1977 and January 21, 1977 the staff attempted in apparent good faith to comply with the General Counsel's representation to the United States Circuit Court of Appeals that the application of Lloyd, Carr would be promptly processed. In spite of approval by the audit staff the Division of Enforcement unilaterally decided without any probable cause subsequent to January 24, 1977 to hold up processing Lloyd, Carr's application, although they admitted that Lloyd, Carr in all respects met the requisite qualifications for FCM registration, until another "audit" was completed. Prior thereto Respondents complied with every request of the staff. And the audit staff admitted that no such audit was required of Respondents. In short, the failure to be registered was due solely to the actions of the staff after Respondents' application should have been processed and registration granted. This defies rudimentary

common sense, fairness and justice.

- B. Under 5 U.S.C. §558(c) Since the Partnership Respondents' Registration as a Commodity Trading Advisor is Still in Effect, It Can Continue to Engage in Commodity Options Transactions Until the Respondents' Application for a New License is Acted Upon or Its Prior Registration is Revoked

The testimony of the Respondent James A. Carr and Miss Chan of the audit staff clearly established that there was no distinction between the entities "Lloyd, Carr & Co." and "Lloyd, Carr Financial Co."; that the two entities were, in fact, one and the same, the two names being business names for the same partnership. The CTA registration was applicable equally to "Lloyd, Carr Financial Co." and "Lloyd, Carr & Co." and, in fact, Mr. Carr was requested by the staff to change the names on all the bank accounts to "Lloyd, Carr & Co." and to amend the FCM application to the name of Lloyd, Carr & Co.

There can be no question that the CTA registration constituted a license to Lloyd, Carr & Co. to deal in commodity options and thus, the Respondents' registration as a CTA now in effect is a license to sell commodity options and to do so with employees not registered as associated persons, since under 5 U.S.C. §558(c) it did not expire during the pendency of its application for FCM registration. A fortiori, it was legally doing business after January 17, 1977. In addition, the partnership Respondent and its employees filed all requisite applications.

The case of Pan-Atlantic Steamship Corp. v. Atlantic Coast Line Railroad Co. et al., 353 U.S. 436, 77 S.Ct. 999, 1 L.Ed. 963 (1957) is directly in point. In that case it was held that a temporary permit to act as a common carrier by water remained in effect until the applicant's request for a permanent license had been acted upon, even though the maximum time for which a temporary permit could be granted under the applicable statute had expired. The mere fact that it continued to operate after the temporary license expired was not a proper basis to prevent the license from continuing to conduct its operations. In this case, Respondents' position is even stronger since its CTA license is valid until June 30, 1977 unless revoked.

C. Under 5 U.S.C. §558(c)(1) and (c)(2) the Respondents Have Not Been Given Any Notice of Any Deficiencies Relating To Maintaining Current Books and Records or the Opportunity to Demonstrate or Achieve Compliance, Making the Denial of Registration on This Ground Improper

It is uncontested that the staff of the CFTC never furnished any written or oral notice relating to the alleged failure to maintain current books and records to the Respondents. The regulations do not list the appropriate records, journals and ledgers which a commodity option dealer must maintain once they are registered as an FCM and the staff in this case has not furnished any guidelines.

In any event, the Respondents do not have, and have

never had, any objection to keeping whatever records the Commission's auditors would deem appropriate for a commodity option dealer. Proper books and records are clearly required to protect the customers but the staff continues in its refusal to advise respondents of what books and records it deems appropriate. As late as March 16, 1977 Respondents requested a letter on what the staff deems the necessary books and records and such request was refused. The evidence is that the audit staff never made known to the Respondents either orally or in writing the alleged deficiencies, so as to enable them to correct such deficiencies. Accordingly, respondents are not in a position to comply. The testimony of Wai-Mon Chan, the auditor employed by the Commission who reviewed the Respondents' records, indicates that the normal practice of the CFTC was to send "deficiency letters" which under 5 U.S.C. §558 has always been standard operating procedure for all federal agencies in such situations, but that she was instructed not to send any "deficiency letter" to the Respondents. Mr. McCarthy of the Audit Division testified that he was instructed by the Division of Enforcement not to furnish a deficiency letter to Respondents and, thus, Respondents obviously had no way of knowing how their books are deficient.

As well as being the fair and reasonable thing for the CFTC to do, the notification of deficiencies and the giving of an opportunity to correct the same are requirements imposed by law. The underlying mandate to the Commission

is the protection of the investing public. Rather than attempt to assist Respondent and in contravention of their statutory duty to help protect Respondents' customers the Division of Enforcement is more concerned with conjuring up, after the fact, a cause of action instead of furthering the Congressional mandate.

D. The Evidence Does Not Sustain
A Finding That The Respondents
Denied The Commission Access
To Their Books and Records.

Rather than showing a denial of access to the Respondents' books and records, the evidence shows that the Commission's auditors were given full access to such records on January 20 and 21, 1977. The only evidence that such access was denied was testimony to the effect that the Respondents' attorney refused to permit Division of Enforcement personnel to conduct an investigation on the Respondents' premises without proper subpoena, and when it was conceded by the Division that at that time Respondents satisfied all of the requirements for FCM application. The Respondents even offered the Division of Enforcement a reasonable random sampling of its customers so that they could ascertain if Respondents were conducting their business properly, which offer was refused. This insistence upon the rights of the Respondents to proper procedural safeguards in the context of an "investigation" by the Division of Enforcement so that its business is not destroyed in no way constitutes a violation of the Act or the regulations promulgated thereunder.

E. The Issues Raised By The Respondents' Motion For Directed Verdict Should Be Decided By The Commission At The Stage Of An Interlocutory Appeal; A Stay Should Be Granted Pending The Appeal; The Respondent Should Be Permitted Oral Argument.

The Respondents, the Division of Enforcement and the public are entitled to a prompt resolution of the fundamental issues raised by the Motion for a Directed Verdict, which raise serious questions as to the Commission's regulatory scheme and the methods that have been used in carrying it out. A stay should be granted pending disposition of the appeal, both to avoid the inconvenience of a proceeding which may become moot and to permit counsel to devote the time to these issues that they deserve.

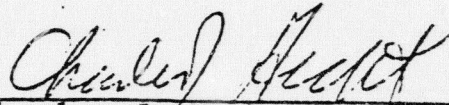
The Respondents submit that oral argument on this appeal is essential to enable the Commission to understand the basic issues which go to the very essence of their regulatory scheme. And the Commission is entitled to hear first hand Respondents' position under the unusual expedited procedures which they ordered.

III. CONCLUSION

The Respondents' Application for an Interlocutory Appeal should be granted. The administrative proceeding should be stayed pending the appeal and oral arguments should be permitted. The relief requested will not prejudice any

party. The ruling of the Administrative Law Judge denying the Motion for Directed Verdict should be reversed, and the Complaint in this matter should be dismissed.

Respectfully submitted,

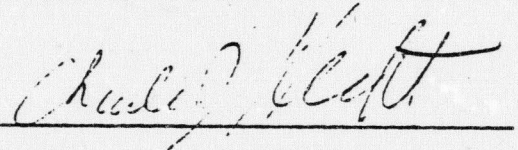


Charles J. Hecht
Attorney for Respondent
60 East 42nd Street - Suite 1760
New York, New York 10017

New York, New York
March 20, 1977

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 1977, I personally
served two true copies of the within ^{APPLICATION AND} Memorandum by personal
delivery thereof to Richard A. Levie, Esq., Division of
Enforcement, Commodity Futures Trading Commission.

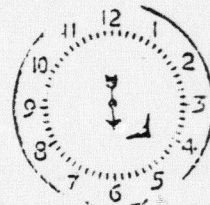


Charles J. Hecht

000058

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

MAR 23 '77



In the Matter of

JAMES A. CARR and
CHARLES P. LeMieux, III d/b/a
LLOYD, CARR & CO., a partnership
84 State Street
Boston, Massachusetts 02109

LLOYD CARR FINANCIAL CO.
84 State Street
Boston, Massachusetts 02109

JAMES A. CARR

CHARLES P. LeMIEUX, III

RESPONDENTS

CFTC Docket No. 77-6 RECEIVED
CFTC
ORDER DENYING APPLICATION FOR INTERLOCUTORY REVIEW
OF DENIAL BY ADMINISTRATIVE
LAW JUDGE OF RESPONDENTS'
MOTION FOR A DIRECTED
VERDICT

ORDER

On March 21, 1977, respondents filed an application requesting interlocutory review by the Commission, pursuant to Section 10.101(a)(5) of the Commission's Rules of Practice, 17 C.F.R. 10.101(a)(5), of the denial by the Administrative Law Judge of a motion for a directed verdict made by respondents. The Administrative Law Judge has refused to certify this matter as appropriate for interlocutory review by the Commission pursuant to Section 10.101(a)(5). In conjunction with its application for interlocutory review, respondents have requested an order staying the proceedings pending the Commission's disposition of

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respondents' application requesting interlocutory review, and an order directing that oral argument be held before the Commission should the Commission grant its application for interlocutory appeal.

On March 22, 1977, the Division of Enforcement filed a memorandum in opposition to respondents' application for interlocutory review.

Upon consideration of respondents' application, the Division's opposition thereto and all documents contained in the Commission's public file in this matter, the Commission finds that:

(1) Any stay granted by the Commission pending the Commission's consideration of the application for interlocutory review would unjustifiably impede the progress of the expedited proceeding;

(2) Pursuant to the provisions of the Commission's Order of March 2, 1977, adopting expedited procedures in this matter, certain of the Commission's Rules of Practice (contained in 17 C.F.R. Part 10), including the provisions of Section 10.101 thereof, have been waived, thus precluding applications to the Commission for interlocutory review pursuant to that Section;

(3) Even if the provisions of Section 10.101 were applicable to this proceeding, interlocutory appeals pursuant to Section 10.101(a)(5) are permitted, in the discretion of the Commission, only as to questions that an Administrative Law Judge has determined to certify to the Commission.

Accordingly, IT IS ORDERED that respondents' application for interlocutory review of the denial by the Administrative Law Judge of respondents' motion for a directed verdict and respondents' request for a stay of the proceedings in this matter are denied.

By the Commission (Chairman BAGLEY, Vice-Chairman RAINBOLT, and Commissioners DUNN and MARTIN). Commissioner SEEVERS not participating.



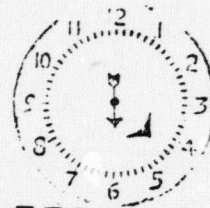
William T. Bagley
Chairman
Commodity Futures Trading Commission

Dated: March 23, 1977

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MAR 23 '77

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION



RECEIVED
CFTC
HEARING CLERK

In the Matter of

JAMES A. CARR and
CHARLES P. LeMieux, III d/b/a
LLOYD, CARR & CO., a partnership
84 State Street
Boston, Massachusetts 02109

LLOYD CARR FINANCIAL CO.
84 State Street
Boston, Massachusetts 02109

JAMES A. CARR

CHARLES P. LeMIEUX, III

RESPONDENTS

CFTC Docket No. 77-6

ORDER DENYING APPLICATION
FOR INTERLOCUTORY REVIEW
OF DENIAL BY ADMINISTRATIVE
LAW JUDGE OF RESPONDENTS'
MOTION FOR A SUBPOENA
DUCES TECUM

ORDER

On March 17, 1977, respondents filed an application requesting interlocutory review by the Commission of the denial by the Administrative Law Judge of an oral motion by respondents for a subpoena duces tecum seeking discovery of certain records of the Commission. The Administrative Law Judge has certified this question as appropriate for interlocutory review by the Commission pursuant to Section 10.101(a)(5) of the Commission's Rules of Practice, 17 C.F.R. 10.101(c)(5). In conjunction with the application for interlocutory review, respondents have requested that the Commission stay the proceedings in this matter pursuant to 17 C.F.R. 10.101(c) pending the Commission's disposition of the application requesting interlocutory review.

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On March 18, 1977, the Division of Enforcement filed a memorandum in opposition to respondents' application for interlocutory review and for a stay of the proceedings.

Upon consideration of respondents' application, the Division's opposition thereto and all documents contained in the Commission's public file in this matter, the Commission finds that:

(1) Any stay granted by the Commission pending the Commission's consideration of the application for interlocutory review would unjustifiably impede the progress of the expedited proceeding;

(2) Pursuant to the provisions of the Commission's Order of March 2, 1977, adopting expedited procedures in this matter, certain of the Commission's Rules of Practice (contained in 17 C.F.R. Part 10), including the provisions of Section 10.101 thereof, have been waived, thus precluding applications to the Commission for interlocutory review pursuant to that Section;

(3) Even if the provisions of Section 10.101 were applicable to this proceeding

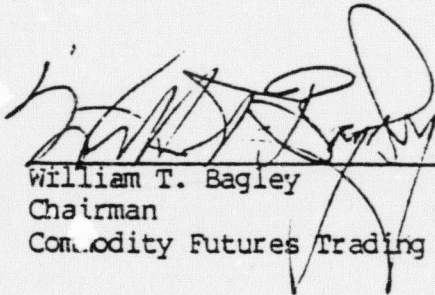
(A) interlocutory review by the Commission pursuant to that Section will be permitted in the Commission's discretion only in extraordinary circumstances, and the Commission finds no such extraordinary circumstances herein which warrant interlocutory review; and

(B) even if such extraordinary circumstances existed, any issues that would be presented to the Commission by an interlocutory

appeal may be addressed by the Commission upon completion of the evidentiary hearing of the expedited proceeding, subsequent to which the entire record of the proceeding will be transmitted to the Commission for decision.

Accordingly, IT IS ORDERED that respondents' application for interlocutory review of the denial by the Administrative Law Judge of respondents' motion for a subpoena duces tecum and respondents' request for a stay of the proceedings in this matter are denied.

By the Commission (Chairman BAGLEY, Vice-Chairman RAINBOLT, and Commissioners DUNN and MARTIN). Commissioner SEEVERS not participating.



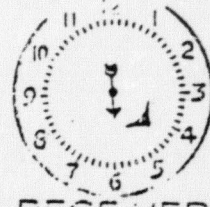
William T. Bagley
Chairman
Commodity Futures Trading Commission

Dated: March 23, 1977

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UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

MAR 23 '77



In the Matter of :
:
JAMES A. CARR and :
CHARLES P. LeMieux, III d/b/a :
LLOYD, CARR & CO., a partnership :
84 State Street :
Boston, Massachusetts 02109 :
:
LLOYD CARR FINANCIAL CO. :
84 State Street :
Boston, Massachusetts 02109 :
:
JAMES A. CARR :
:
CHARLES P. LeMIEUX, III :
:
RESPONDENTS :

CFTC Docket No. 77-6 RECEIVED
CFTC
ORDER MODIFYING MARCH 2, 1977 ORDER ADOPTING
EXPEDITED PROCEDURES

ORDER

On March 23, 1977, the Division of Enforcement filed a motion to modify and clarify the Commission's Order of March 2, 1977, adopting expedited procedures in this matter. The Division of Enforcement has represented that since the evidentiary record in the proceeding has been more voluminous than anticipated, additional time will be necessary to prepare the proposed findings of fact, conclusions of law, legal briefs and support thereof.

The Division of Enforcement has also requested the Commission to clarify its Order of March 2, 1977, to provide for the issuance of a recommended decision by the Administrative Law Judge in conformance with 5 U.S.C. §557(c) (A) and (B) (1970). Respondents have opposed this aspect of the Division of Enforcement's motion.

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5 U.S.C. §557 requires that when an agency makes a decision without having presided at the reception of the evidence, the presiding Administrative Law Judge shall first recommend a decision. Section 557 also entitles the parties to a reasonable opportunity to submit exceptions to the recommended decision and supporting reasons for the exceptions. Consequently, the Commission need not modify its Order dated March 2, 1977, to incorporate the statutory requirements that the Administrative Law Judge make a recommended decision and the parties have an opportunity to submit exceptions. The Commission has, however, determined that the Administrative Law Judge file a recommended decision within 10 calendar days following the filing and service of reply briefs and that the parties shall have 5 calendar days following receipt of the recommended decision in which to file any exceptions and supporting reasons for the exceptions to the recommended decision.

Respondents have represented that they do not oppose the Division of Enforcement's request for additional briefing time as set forth in Paragraphs (a) and (b) below.

Accordingly, based on the representations of the Division and there being no objection to the modification of the briefing schedule, IT IS ORDERED that Section f of the March 2, 1977, Order Adopting Expedited Procedures be modified as follows:

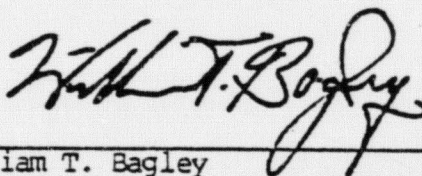
(a) Within 7 calendar days after completion of the evidentiary hearing, the parties shall file with the Office of Hearings and Appeals in Washington, D.C. and serve upon opposing counsel Proposed Findings of Fact, Conclusions of Law and legal briefs in support thereof;

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(b) Within 3 days thereafter the parties shall file with the Office of Hearings and Appeals in Washington, D.C., and serve upon opposing counsel reply briefs.

IT IS FURTHER ORDERED that the Administrative Law Judge shall have 10 calendar days following the filing and service of reply briefs to file with the Commission and serve upon the parties a recommended decision in accordance with 5 U.S.C. §557(c) (A) and (B) (1970), and that the parties shall have 5 calendar days following receipt of the recommended decision to file any exceptions and supporting reasons for the exceptions to the recommended decision. Upon receipt of any exceptions and reasons in support thereof to the recommended decision, the Administrative Law Judge shall certify and transmit to the Commission the transcript and record of the proceedings.

By the Commission (Chairman BAGLEY, Vice-Chairman RAINBOLT and Commissioners DUNN and MARTIN). Commissioner SEEVERS not participating.



William T. Bagley
Chairman
Commodity Futures Trading Commission

Dated: March 23, 1977

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COMMODITY FUTURES TRADING COMMISSION

2033 K Street, N.W., Washington, D.C. 20581

March 24, 1977

CERTIFIED RETURN REQUESTED

Mr. Charles J. Hecht
Attorney for Respondents
60 East 42nd. Street
Suite 1760
New York, New York 10017

Re: In the Matter of James A. Carr and Charles P. LeMieux,
III, et al. - CFTC Docket No. 77-6

Dear Mr. Hecht:

Enclosed please find a copy of the Judge's Notice,
which has been received and filed with this office in the
above-entitled proceeding.

Very truly yours,

Deedra K. Jones
Hearing Clerk
Office of Hearings and Appeals

Enclosure

bcc: William Schief, Dick Levie, ENF
Linda Pedone, OED
ddonato 3/24/77

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UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

MAR 24 11 4



RECEIVED
CFTC
HEARING CLERK

In the Matter of

:

JAMES A. CARR and
CHARLES P. LEMIEUX, III d/b/a
LLOYD, CARR & CO., a partnership
84 State Street
Boston, Massachusetts 02109

:

CFTC Docket No. 77-6

LLOYD CARR FINANCIAL CO.
84 State Street
Boston, Massachusetts 02109

:

JAMES A. CARR

:

CHARLES P. LEMIEUX, III

:

Respondents

NOTICE

1. The parties are on notice that the decision in this proceeding will include a specific inferential finding of fact that on March 17, 1977, respondents' books and records were not being maintained in accordance with the law and regulations. See Transcript pages
2. Respondents may, in the next five (5) days, have their books and records audited by an accountant for the sole purpose of determining whether respondents are now in compliance with Commission regulations 1.18 and 32.7.
3. This audit may be performed by an auditor employed by the Commodity Futures Trading Commission or by an independent CPA firm. Should respondents elect to have the audit performed by an independent CPA firm, then the respondents shall be responsible for the costs involved.

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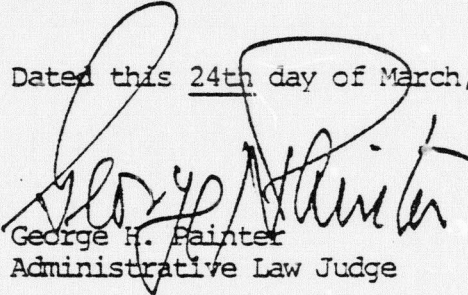
4. In the event respondents elect to have an independent CPA conduct the audit, the respondents shall submit to the Administrative Law Judge a list of ten (10) CPA firms that do business in the Boston area. The Administrative Law Judge shall make a random selection to determine the particular firm to do the audit.

5. The parties to this proceeding shall agree that the CPA conducting any such audit will not be given any instructions except for those given by the Administrative Law Judge. The Administrative Law Judge shall instruct the CPA as follows:

- a. The audit will be conducted to determine whether or not respondents are maintaining books and records in accordance with ordinary business practices;
- b. The CPA conducting the audit shall be furnished with copies of regulations 1.18 and 32.7, without any explanation by the parties or the Administrative Law Judge. The CPA shall indicate in his report whether or not respondents are in compliance with the regulations as the auditor understands the regulations.

6. Should this audit not be conducted, then the Administrative Law Judge writing the decision on this case will have little choice but to find that the books and records are not in order at this time.

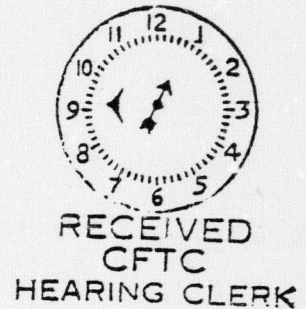
Dated this 24th day of March, 1977


George H. Painter
Administrative Law Judge

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APR 1 77

Charles J. Hecht
COUNSELOR AT LAW
60 East 42nd Street
New York, N. Y. 10017
—
Telephone (212) 490-3232



Letter 1760

March 28, 1977

Hon. George Painter
Administrative Law Judge
Commodity Futures Trading Commission
2033 K Street, N.W.
Washington, D.C. 20581

Re: CFTC Docket No. 77-6

Dear Judge Painter:

This letter is submitted in response to your notice dated March 24, 1977, received by my office at 12:30 p.m. on March 28, 1977, and should be made part of the record. Prior to considering the same, let me make it very clear that the material set forth in Paragraph 1 that your decision will "include a specific inferential finding of fact that on March 17, 1977, respondents' books and records were not being maintained in accordance with the law and regulations" is totally improper. The record made in the evidentiary proceeding in this case could not be clearer. The Division of Enforcement took the position that Miss Chan should not inspect the books and records of respondent as it is irrelevant, that any limitation with respect to the stealing of customer names was improper and refused to be subject to an enforceable order of a federal court. Accordingly, there is no basis on the record for your "specific inferential finding". Furthermore, after you subsequently stated that such information would be relevant, respondents' counsel on March 17, 1977 offered to permit Miss Chan to inspect the partnership respondents' books and records and the staff disclosed such offer (pp. 701-703). Generally, and especially under these circumstances, it is improper to shift the burden of proof from the staff to respondents where the staff has failed to prove its allegations through its own acts and conduct. Further, as the staff well knows, a violation of your order is not enforceable.

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Hon. George Painter
Page 2
March 28, 1977

The alternative of obtaining another accounting firm as set forth in your notice is really not an alternative in view of the time limitation that this "audit" need be completed by March 29, 1977. As long as such "audit" is furnished to you prior to April 14, 1977 it would appear to be sufficient.

After discussing your notice with my clients we will respond accordingly.

Respectfully submitted,

Charles J. Hecht
Charles J. Hecht

/gk
cc: Richard A. Levie, Esq.
Commodity Futures Trading Commission

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COMMODITY FUTURES TRADING COMMISSION

2033 K Street, N.W., Washington, D.C. 20581

April 13, 1977

CERTIFIED RETURN REQUESTED

Mr. Charles Hecht, Esquire
60 East 42nd Street
Suite 1760
New York, New York 10017

Re: In the Matter of James A. Carr and Charles P. LeMieux,
III, et al CFTC Docket No. 77-6

Dear Mr. Hecht:

Enclosed please find a copy of the Administrative Law Judge's Recommended Decision, which has been received and filed with this office.

Pursuant to the applicable Rules of Practice governing these proceedings and Order Modifying March 2, 1977 Order Adopting Expedited Procedures, you may file exceptions and supporting reasons for the exceptions to the recommended decision within five (5) days following receipt of the Recommended Decision.

If you file exceptions and supporting reasons for the exceptions to the Recommended Decision to the Commission, an original and ten (10) copies should be filed with the Hearing Clerk, Office of Hearings and Appeals.

Sincerely yours,

Deedra K. Jones
Hearing Clerk
Office of Hearings and Appeals

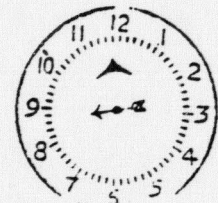
Enclosure

bcc: William Schief, Dick Levi, ENF, w/encls.
Richard Graham, OGC, w/encls.
Ray Schleeter, PIO, w/encls.
Secretariat, w/encls.
cbroadnax 4/13/77

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UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

APR 13 77



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HEARING CLERK

In the Matter of

JAMES A. CARR and
CHARLES P. LemIEUX, III d/b/a
LLOYD, CARR & CO., a partnership
84 State Street
Boston, Massachusetts 02109

CFTC DOCKET NO. 77-6

JAMES A. CARR and
CHARLES P. LemIEUX, III d/b/a
LLOYD CARR FINANCIAL CO.
84 State Street
Boston, Massachusetts 02109

JAMES A. CARR

CHARLES P. LemIEUX, III

RESPONDENTS

Before: Painter, Administrative Law Judge

RECOMMENDED DECISION

PRELIMINARY STATEMENT:

This is an administrative proceeding under the Commodity Exchange Act, as amended ("the Act"), 7 U.S.C. §1 et seq., initiated on February 3, 1977.

The complaint charged that since on or about January 17, 1977, James A. Carr and Charles P. Lemieux, III d/b/a Lloyd, Carr & Co., a partnership, ("Lloyd, Carr & Co.") aided and

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abetted by James A. Carr ("Carr") and Charles P. LeMieux, III ("LeMieux"), had engaged in the solicitation and sale of commodity options to the public without being registered with the Commodity Futures Trading Commission ("Commission") as a futures commission merchant ("FCM"), and supervised and knowingly permitted persons not registered with the Commission as associated persons ("AP") to engage in the solicitation and acceptance of orders for the purchase of commodity options on behalf of Lloyd, Carr & Co., in violation of Section 4c(b) of the Act [7 U.S.C. §6c(b)] and Section 32.3 of the Rules and Regulations thereunder [17 C.F.R. §32.3]. The complaint also charged that Lloyd, Carr & Co., aided and abetted by Carr and LeMieux, failed to prepare and keep current those books and records required to be kept by Sections 1.18 and 32.7 of the Rules and Regulations promulgated under the Act [17 C.F.R. §§1.18 and 32.7]. In addition, Lloyd, Carr & Co. was charged with refusing to permit Commission personnel to inspect its books and records on January 27, 1977, in violation of Section 1.18, 1.31 and 32.7 of the Rules and Regulations promulgated pursuant to the Act [17 C.F.R. §§1.18, 1.31 and 32.7]. Carr and LeMieux d/b/a Lloyd Carr Financial Co. ("Financial"), which is registered with the Commission as a commodity trading advisor ("CTA") was also named as a respondent. The violations attributed to Carr and LeMieux were alleged as the basis for revoking or suspending the CTA registration of Financial.

On March 2, 1977, the Commission ordered that expedited procedures be adopted in this matter. Pursuant to that Order and an Order modifying March 2, 1977 Order Adopting Expediting Procedures, the Commission has required transmission of the full evidentiary record together with a recommended decision of the Administrative Law Judge for its consideration and decision. On March 9, 10, 11, 15, 16, 17, 21, 22, and 23, 1977, a hearing was held in Boston, Massachusetts and Washington, D.C. Richard A. Levie, Esq. and Ellen R. Meltzer, Esq. appeared on behalf of the Division of Enforcement and Charles J. Hecht, Esq. appeared on behalf of all the respondents.

ISSUES:

The issues to be determined in this proceeding are whether the allegations set forth in the complaint are true, and if so:

(A) whether, pursuant to Sections 6(b) and 8a(3) of the Act, the registration of Lloyd Carr Financial Co. as a commodity trading advisor should be suspended or revoked;

(B) whether, pursuant to Section 8a(2) of the Act, Lloyd, Carr & Co.'s application for registration as a futures commission merchant should be refused; and

(C) whether cause exists why an appropriate order should not be made and entered in accordance with Sections 6(b) and

6(c) of the Act:

(1) Directing that Lloyd Carr Financial Co., Lloyd, Carr & Co., James A. Carr and Charles P. LeMieux, III cease and desist from violating the Act, in the manner alleged in Section II of the Complaint;

(2) Prohibiting Lloyd Carr Financial Co., Lloyd, Carr & Co., James A. Carr and Charles P. LeMieux, III from trading on or subject to the rules of any contract market and requiring all contract markets to refuse such persons all trading privileges thereon; and

(3) Assessing Lloyd Carr Financial Co., Lloyd, Carr & Co., James A. Carr and Charles P. LeMieux, III each with a civil penalty of not more than \$100,000 for each violation.

RECOMMENDED FINDINGS OF FACT

1. Lloyd, Carr & Co. is a Massachusetts partnership with its principal place of business at 84 State Street, Boston, Massachusetts and branch offices in Greenwich, Connecticut and St. Louis, Missouri [Tr. 215, 601-602, R.A. §I, ¶4]. ^{1/} From July 1, 1976 until mid-January, 1977, Lloyd, Carr & Co. was a sole proprietorship with James A. Carr as president [Tr. 222-223, 230, DX 26(a)]. In mid-January, 1977,

^{1/} "Tr.", "DX", "RX" and "R.A." refer, respectively, to the transcript of the hearing in this matter, Division of Enforcement exhibit, Respondents' exhibit and Respondents' answer to the complaint.

Lloyd, Carr & Co. became a partnership with James A. Carr and Charles P. LeMieux, III as its only partners [Tr. 214, 223; DX 27]. From July, 1976 to the present Lloyd, Carr & Co. has engaged in the business of soliciting and accepting orders and monies from the public for the purchase of "London" commodity options [Tr. 216-216; DX 26(a)].

2. Lloyd Carr Financial Co., a Massachusetts partnership with its principal place of business at 84 State Street, Boston, Massachusetts became registered with the Commission as a CTA on or about November 19, 1976 [Tr. 527; R.A. §I, ¶2]. Financial is a partnership between Carr and LeMieux [Tr. 222-224; DX 9(a); R.A. §I, ¶4]. Formed at approximately the same time as Lloyd, Carr & Co., both firms engaged in the same business until mid-January, 1977, at which time all of Financial's assets and bank accounts were transferred to Lloyd, Carr & Co. [Tr. 222-224]. On or about November 19, 1976, Financial became registered with the Commission as a CTA [Tr. 524; R.A. §I, ¶2].

3. James A. Carr, a resident of Hull, Massachusetts, is president of Lloyd, Carr & Co. and is primarily responsible for the day-to-day operation of the partnership. As such, he also participates in the training of salespersons [Tr. 33, 47, 49, 57-59, 182-183, 214-215, 229-230]. Carr is not registered with the Commission as an AP [R.A. §I, ¶5].

4. Charles P. LeMieux, III now resides in Montreal, Canada. His duties with Financial and Lloyd, Carr & Co.

included administrative functions, sales and the training of other account executives [Tr. 226-227, 229, 5811]. LeMieux is registered with the Commission as an AP [R.A. §I, ¶6].

5. On October 1, 1976, Financial filed with the Commission an application for registration as an FCM [Tr. 280, 510, 530; DX 9(a)].

6. On or about October 12, 1976, the FCM application was returned to Financial because the application failed to include the required Statement of Financial Condition (Form 1-FR), failed to include certain biographical data relating to Carr and LeMieux and was undated [Tr. 510-511, 530]. The application was returned to Financial by a cover letter which specified the deficiencies of the application [Tr. 511-514; DX 26(j)].

7. Allen Cooper, the Commission employee in charge of processing FCM applications for the geographic region in which Financial was located, testified that the normal procedure regarding returned applications was to have one of his staff telephone the applicant within a week or two after an application is returned to ascertain whether it will be resubmitted [Tr. 504; 516].

8. Thereafter, several unsuccessful attempts were made to contact Carr by telephone [Tr. 516-517]. However, sometime in November, 1976, Cooper spoke with Carr, informed him again of the deficiencies in Financial's application and inquired

when it would resubmit its application, inasmuch as no processing would occur in the interim. Carr said he would contact Cooper within a week [Tr. 517-518]. At no time during this conversation did Carr allege that he had not received the deficiency letter [Tr. 517].

9. In mid-December Cooper again advised Carr that the Commission had still not received Financial's application and financial statement; Carr indicated that he would speak with his attorney, Charles Hecht [Tr. 519, 540].

10. On December 22, 1976, when Hecht called Cooper, Hecht was advised that Financial's application and financial statement had still not been received [Tr. 520, 543].

11. On January 17, 1977, Financial resubmitted to the Commission the FCM application that had originally been filed on October 1, 1976, which included for the first time the required Form 1-FR [Tr. 305, 520; DX 9(a), DX 23].

12. During a pre-registration examination of Financial's books and records which was conducted by a CFTC auditor on its premises on January 20, 1977 there were discovered discrepancies in the data contained in the 1-FR. As a result an amended 1-FR was submitted on January 20, 1977 [Tr. 365, 373-375; DX 24].

13. On January 20, 1977, Financial had the following books and records: bank statements, carrying broker's month-end statements, customer order forms and 3x5 index cards containing information on options purchases by customers [Tr. 370, 378, 384].

Financial lacked a customer ledger that would enable the verification of monies received from option sales and did not have current records supporting its liability, income or expense accounts [Tr. 384, 431-433].

14. From the results of this pre-registration examination it was apparent that Financial in all likelihood satisfied the minimum financial requirements for options dealers [Tr. 153, 155, 387]. However, because Financial had not maintained a trial balance, general ledger and cost receipt and disbursement journals its financial conditions could not be precisely and accurately determined [Tr. 158-159, 163-164, 169, 378-379, 430-434]. On January 20, 1977, Financial was advised that it was in apparent violation of Regulation 1.18 [Tr. 379].

15. Upon review of the report of the pre-registration examination of Financial's books and records it became apparent that Financial claimed as assets monies in bank accounts in the names of both Financial and Lloyd, Carr & Co. As a result, Mr. O'Brien, Associate Director of Trading and Markets, suggested to Carr that the accounts be combined in one name in one application [Tr. 157-158, 223, 338-339, 501-503, 653, 695].

16. On January 25, 1977, a new FCM application and 1-FR, this time in the name of Lloyd, Carr & Co., were filed with the Commission [Tr. 304, 521-522, 544, 665; DX 26(t), (u) and (v), DX 27, DX 29].

17. As a result of the examination of January 20 and 21,

1977 and the filing of the new FCM application and Form 1-FR, it was determined that a further audit be performed prior to Lloyd, Carr & Co.'s registration to assure compliance with the regulation relating to minimum financial and record-keeping requirements [Tr. 163, 169].

18. It is also apparent that the Division of Enforcement had some interest in performing a further examination of Lloyd, Carr & Co.'s books and records. However, the basis for this interest is not readily apparent from the record, nor was it communicated to respondents [Tr. 657-662].

19. On January 26, 1977, a conference call initiated by members of the staff of the Commission took place. The participants in that conversation were: Messrs. Levie and Stewart of the Division of Enforcement, Messrs. Lyons and O'Brien of the Division of Trading and Markets, and respondent James A. Carr and counsel Charles Hecht. In substance, the following conversation took place:

- (1) The staff stated that it was necessary that another audit be performed with members of both the Audit and Enforcement Divisions participating.
- (2) Respondent, through counsel, replied that the Audit staff would be permitted but that Enforcement would not. Counsel further stated that once Lloyd, Carr and Co. was registered as an FCM, the Enforcement Division would be permitted to examine all of its books and records.
- (3) The Commission's staff once again reiterated its intention to have Enforcement participate

in the examination and on that basis
Lloyd, Carr & Co. refused to permit
any inspection of its books and records
by Commission personnel. [Tr. 657-662]

20. On January 27, 1977, Lloyd, Carr & Co. refused to permit inspection of its books and records by Commission personnel [Tr. 149, 170]. Lloyd, Carr & Co. did offer to permit Commission personnel an opportunity to select 15 customer names at random and to contact those customers [Tr. 166].

21. On March 11, 1977, Lloyd, Carr & Co. refused to permit inspection of its books and records by Commission personnel as ordered by the Administrative Law Judge. The order of the Administrative Law Judge provided that Commission personnel were prohibited from contacting customers on the basis of this inspection. Respondents' refusal warrants a finding that respondents' books and records were out of order on March 11, 1977, and it is so found [Tr. 255-260].

22. Between January 17 and 19, 1977, Carr and LeMieux discussed whether or not Financial and Lloyd, Carr & Co. should continue to solicit orders for the purchase of commodity options while not registered as an FCM. The decision was to continue selling options [Tr. 604-606].

23. Carr did not object to the continued selling of options after January 17, 1977 by Lloyd, Carr & Co. salespersons who were not registered as AP's although he had the

authority to do so [Tr. 303].

24. Prior to January 17, 1977, Carr was aware that processing the applications of persons desiring to be registered as associated persons would take approximately 30 to 60 days [Tr. 271]. On January 14, 1977, a Commission News Release stated that "[O]nly ... individuals who filed completed associated person applications prior to December 27, 1976 ... will be able to legally sell commodity options after the Monday (January 17, 1977) deadline" [DX 28].

25. On January 20, 1977, for the first time Financial forwarded to the Commission the completed applications of 38 persons for registration as associated persons [DX 11(a)].

26. Since January 17, 1977, salespersons for Financial and Lloyd, Carr & Co. have solicited and accepted and continue to solicit and accept orders for the purchase or sale of commodity options while not registered with the Commission as AP's [Tr. 32-33, 45, 57, 49, 71-73, 82, 114-115, 178, 183-185, 192; DX 35].

27. The number of salespersons employed in the Boston office of Lloyd, Carr & Co. increased from 22 to approximately 50 between January 17, 1977 and March 9, 1977 [Tr. 47].

28. Saleswoman Shaffer, on behalf of Lloyd, Carr & Co., solicited approximately 1500-2500 persons between January 17, 1977 and March 9, 1977, in an effort to sell commodity options [Tr. 32-33, 49]. She was not registered as an AP until March 17,

1977 [DX 4, DX 35].

29. Eric Garvanne estimated that from February 1, 1977 to March 8, 1977, on behalf of Lloyd, Carr & Co., he contacted 1000-2000 persons in an attempt to solicit orders for commodity option purchases on behalf of Lloyd, Carr & Co. [Tr. 184-185]. As of March 10, 1977, Garvanne was not registered as an AP. [Tr. 184, 192].

30. Michael Shuster, estimated that between January 17, and March 9, 1977, on behalf of Lloyd, Carr & Co., he spoke with 50 to 100 persons per day in an effort to solicit orders for the purchase of commodity options from Lloyd, Carr & Co. Greenwich office [Tr. 71-72]. As of March 22, 1977, Shuster was not registered as an AP [DX 5, DX 35].

31. Mr. William Paulék of the Commission's Registration staff testified that it took on the average 36.1 days to process the applications of those persons associated with Lloyd, Carr & Co. [Tr. 789, 802, 805].

32. The delay in processing these applications was due, at least in part to the fact that the firm's check for the registration fees which accompanied all applications submitted on January 20, 1977 was dishonored and that processing could not begin until the registration fees were paid [Tr. 805-806, DX 11(a)].

33. James A. Carr personally solicited orders from Edward Talbot on February 2 and 28, 1977 [Tr. 115-117, 121-122,

132, 234-235; DX 6].

34. Carr "has prior expertise in business and is familiar with the need to comply with governmental regulations" [Tr. 222].

35. During the fall of 1976, James A. Carr was aware of the options regulations published by the Commission on October 8 and November 24, 1976 which required the registration of FCM's and AP's by January 17, 1977 [Tr. 266-268, 271, 285-286, 291-293, 303; DX 26(a), (b), and (c)].

36. From January 17, 1977 to February 2, 1977, Financial accepted from the public approximately \$338,354 for the purchase of commodity options [Tr. 326, 338-342; DX 12(d)-(f)].

37. Since January 17, 1977, Lloyd, Carr & Co. has accepted and continues to accept from the public monies for the purchase of commodity options [Tr. 35, 37, 72, 74, 179, 185-186, 325-326, 332-340, 342; DX 15(a)-(x), DX 18(a)-(f), DX 20(a)-(h), DX 21(a)-(w), DX 22(a)-(aa); DX 26(c), DX 26(s)]. During the four week period of February 3, 1977 to March 2, 1977, alone Lloyd, Carr & Co. received approximately \$448,655 from customers for the purchase of commodity options [Tr. 339-340, 342, DX 13(a)-(d)].

38. Carr knows on a daily basis the amount of monies received from the public for the purchase of commodity options [Tr. 330-338; DX 15(a)-(x)].

39. Solely to accommodate respondents, or counsel for respondents, this hearing opened on March 9 rather than March 8; the hearing was recessed on March 10 and 11 to permit respondents'

counsel to tend to other legal chores; the hearing was reconvened on March 15 rather than March 14 to permit respondent Carr and respondent's counsel an opportunity to attend a hearing in Canada; the hearing on March 21 ended at 10:50 due to the failure of LeMieux to appear as a witness; the hearing recessed early on March 22 due to failure of respondents to have witnesses available; the hearing was terminated at 8:32 a.m. on March 23 due to respondents refusal to comply with a direct, specific order to have witnesses available at 8:30 a.m. to begin testimony [Respondent's Telegraphic Motion, March 4, 1977, Respondent's Telegraphic Motion, March 11, 1977, Tr. 726-729, 732, 812-817, 819].

40. The record warrants a finding that respondents deliberately caused the hearing to end on March 23 to make it appear that they had been denied an opportunity to put on evidence.

41. Because the Commission's Complaint does not charge fraud or the like, the Administrative Law Judge issued a Notice that, post-hearing, respondents could have their books and records audited by an independent certified public accountant, to be selected from a list of 10 to be submitted by respondents, and that the record would be reopened to receive such an audit report. Respondents declined to avail themselves of this opportunity. It is accordingly found that respondents' books and records are currently out of order

[Notice, March 24, 1977].

42. The refusal of respondents to have an independent auditor review their business records warrants a finding that the refusal to permit authorized Commission personnel an opportunity to inspect such records was not predicated on any fear or suspicion that a Commission audit would be for other than legitimate purposes. It is specifically found that respondents' failure to have an audit done by an independent auditor of its own choosing was predicated upon the fact that respondents' books and records are out of order and not in compliance with Commission regulations.

D I S C U S S I O N

The Commodity Exchange Act ("Act") provides that any person charged with a violation of the Act shall be afforded an opportunity for hearing before any sanctions may be imposed. From the day the hearing opened on this matter until the final post hearing briefs were filed, it was abundantly clear that respondents did not appreciate having this hearing thrust upon them. Strenuous efforts were made to have this proceeding stayed or abated, and in the alternative to convert the hearing into a trial of the Commission and its regulations. The reluctance with which respondents approached this hearing was manifested in part by late arrival of counsel to hearing sessions,

failure to have witnesses available, and failure to permit inspection of its books and records while the hearing was in progress.

Respondents were given considerable latitude in this hearing because it was, after all, an expedited proceeding. Rather than convene on March 8, 1977, pursuant to the Commission's order, the hearing opened on March 9, 1977, to accommodate respondents' counsel. Pursuant to a stipulation reached in the federal district court the hearing was recessed on the afternoons of March 10 and 11 solely to permit respondents' counsel to attend to other legal matters. The hearing did not reconvene on March 14 in order to permit respondent James A. Carr and respondents' counsel to attend a hearing in Montreal, Canada. Despite full notice that the Division of Enforcement desired to have Charles P. LeMieux, III appear and testify, and an oral subpoena for his presence, respondents' counsel failed to produce Mr. LeMieux. In fact, Mr. LeMieux remains somewhat of a mystery figure in this proceeding. He is a partner in Lloyd, Carr & Co., and yet neither respondents' counsel nor Division's counsel were able to determine his whereabouts or even communicate with Mr. LeMieux by telephone. As a result of Mr. LeMieux' failure to appear as a witness, the Division's case was cut short.

It may not be gainsaid that respondents' counsel is a skilled, competent attorney, and his busy schedule attests

to the fact that his services are in great demand. He had a tendency to be a little late for virtually every hearing session. No umbrage was taken as these brief delays did not substantially affect the hearing process. But there comes a time when order must prevail. On March 21, 1977, the parties were put on notice that the following day, March 22, the hearing would commence at 10:00 a.m. and evidence would be taken for at least 6 hours. Because of respondents' failure to have witnesses available the hearing on March 22 lasted for only 2-1/2 hours. At the close of the hearing session on March 22 respondents' counsel was directed to have his witnesses available at 8:30 a.m. on March 23, and that failure to have witnesses available would result in closure of the hearing.

Respondents' counsel objected vigorously to opening the hearing at 8:30 a.m. on March 23, asserting that it would be an imposition on the witnesses to travel to Washington the night before the hearing. After all, he argued, the witnesses were family men. No such solicitous concern had been expressed by respondents' counsel for similar impositions placed on others involved in this hearing. In fact, the entire hearing retinue was required on frequent occasions to sit idly by in Boston, Massachusetts and in Washington, D.C., while respondents' counsel attended to his many other duties. It is believed that he intended to accomplish the following: (1) to delay the

hearings in hopes that he could have the proceeding stayed by order of the federal court or (2) to make the record appear to have deprived his clients of an opportunity to be heard. At 8:30 a.m. counsel for respondents' appeared on time, but without any witnesses. He immediately went into an explanation of weather conditions in New York and the like. The failure of respondents' counsel to have witnesses available pursuant to the explicit and unambiguous orders of the presiding official the preceding day represents either a callous indifference to the hearing process, or a deliberate and calculated effort to make it appear that respondents were being denied an opportunity to participate fully and fairly in this hearing that they did not want. The record must speak for itself. At 8:33 a.m. on March 23, 1977, the hearing was closed.

The Commission's Complaint charges respondents with various violations of the Act and implementing regulations, none of which deal with fraud, misrepresentation, missuse of customer funds, or similar acts or practices. This does not suggest that the violations charged in the Complaint are of a purely technical nature. It does suggest, however, that with a modicum of good faith effort, respondents could have brought themselves into compliance with the law and regulations, thus avoiding the cost and time involved in this proceeding.

The facts show that respondents caused to be filed with the Commission on or about October 1, 1976, an application for

the registration of Lloyd Carr Financial Co., a partnership, as a futures commission merchant. At the time of this application, Lloyd Carr Financial was registered as a commodity trading advisor pursuant to controlling Commission regulations. Newly promulgated Commission regulations required that as of January 17, 1977, all entities engaged in the sale of commodity options had to be registered as futures commission merchants.

On or about October 12, 1976, the application of Lloyd Carr Financial Co. was returned to respondents due to failure of the applicant to include a required financial statement. According to testimony of Commission witnesses, the rejected application was returned along with a form deficiency letter. Respondents concede that the application was returned, but maintain that it was not accompanied by a deficiency letter. Whichever is true, it is indeed strange that a businessman of Mr. Carr's stature would neglect to even inquire as to why the application was returned. The evidence further shows that Commission personnel went far beyond the call of duty in apprising respondents of the need to file a financial statement in connection with the application for registration as a futures commission merchant. If the testimony of Commission witnesses is believed (and it is) then clearly respondents displayed little interest in even returning telephone calls regarding this matter.

On the last day that persons other than registered futures commission merchants could engage in the business of selling options, January 17, 1977, respondents caused to be filed with the Commission a second or amended application for the registration of Lloyd Carr Financial Co., and on this occasion the application included a financial statement. It is simply astonishing that a businessman of Mr. Carr's experience would have neglected this crucial matter for so long a period of time. It may be that Mr. Carr hoped that the federal courts would declare the pertinent Commission regulations invalid. But at any rate, his vain hopes, or gross negligence in letting this matter slide, does little to help his case. The second or amended application included a financial statement, but it listed as the assets of Lloyd Carr Financial Co. the assets of Lloyd, Carr & Co. Respondents contend that the Commission should not have been so concerned over this difference in names. Now, a rose by another name may smell as sweet, but in the field of business as well as law, the name a difference makes. No purpose would be served in giving a dissertation on such a rudimentary point of law. The application was patently unacceptable.

On or about January 25, 1977, respondents caused to be filed with the Commission an application for the registration of Lloyd, Carr & Co. And this application seemed to pass muster with Commission auditors. By this time, however, the

Division of Enforcement had taken an interest in the matter, and sought to have Lloyd, Carr & Co.'s books and records audited prior to registration. At this point respondents ended any pretense at complying with the Commission's regulations and flatly refused to permit authorized Commission personnel to enter the premises of Lloyd, Carr & Co. The result of this refusal was the Commission's Complaint.

Respondents' legal posture on the issue of compliance with the Commission's regulations has been consistent, if not lawful, throughout this proceeding. Respondents contend that they will permit inspection of Lloyd, Carr & Co.'s books and records for legitimate purposes, and that respondents alone will determine whether any such inspection is for legitimate purposes and, even then, the degree of inspection to be permitted. See Respondents' Proposed Findings 32-35, as well as the post-hearing affidavit of James A. Carr, wherein he states as follows: "Finally, I once again extend my invitation to the audit staff to come to the premises of Lloyd, Carr & Co. provided they come for legitimate audit purposes." This degree of audacity is perhaps unsurpassed in this newly regulated industry.

Because the Complaint fails to allege fraud or the like, the Administrative Law Judge sought to have introduced into the record evidence concerning the present status of respondents' books and records. The Administrative Law Judge directed the

Commission's auditor present at the hearing to visit the Lloyd, Carr & Co. offices and do a cursory inspection to determine whether there was present compliance with Commission regulations. To allay any genuine fears respondents may have had, the Administrative Law Judge further ordered the auditor to refrain from contacting any customer. Despite this, respondents again flatly refused to permit such an inspection. Respondents were promptly advised on the record that should the Administrative Law Judge render the initial decision on this case, then the decision would include an inferential finding that respondents' books and records were not in order.

Respondents were on notice as early as October, 1976, that effective January 17, 1977, futures commission merchants engaged in options dealings could only employ salespersons duly registered as associated persons with this agency. Consistent with their attitude towards registration of Lloyd Carr Financial or Lloyd Carr & Co., respondents took no action to have its sales personnel registered with this Commission until January 20, 1977. Rather than admit that they had been dilatory in this regard, respondents argued at the hearing that Lloyd, Carr & Co. had been singled out for persecution by this Commission, and that the applications of Lloyd, Carr & Co. sales personnel had been deliberately delayed in processing. Near the conclusion of the trial, Commission personnel furnished statistics on the registration of associated

persons which showed the average time taken for the registration of associated persons was 36 plus days, while the registration of employees of Lloyd, Carr & Co. took 48 days. It was further pointed out that Lloyd, Carr & Co. personnel took longer to register due to the fact that the initial check for fees, sent in by Lloyd Carr Financial Co., had been dishonored by the bank. In short, the argument that the Commission had deliberately delayed the processing of respondents' personnel applications is without any foundation in fact. Respondents were dilatory and grossly negligent in failing to see that its sales personnel made timely applications for registration with this Commission.

It may well be that respondents' morbid distrust of any action by this agency, including the hearing, has some foundation in fact. According to the unrebutted testimony of James A. Carr, a Commission employee contacted the United States Trust Co., Boston, Massachusetts, and caused the bank to discontinue doing business with respondents. At that time respondents had on deposit with the bank an amount in excess of \$140,000.00. It is a rare bank that turns that amount of money out into the cold. It may be, however, that the bank had reason to believe that it would suffer more by retaining the account than by terminating the account. If Commission personnel caused the bank to cease doing business with respondents, then indeed this was an ultra vires action. In no manner, however, does

this explain away the blatant failure of respondents to comply with the law and regulations before this event or after.

A few comments on the demeanor of the witnesses at the hearing is in order. Mr. Shuster and Miss Schaffer, sales persons employed by respondents, impressed the Administrative Law Judge as being above average in intelligence and articulance. The same may be said of Mr. Garvanne, although he seemed a little lost on some of the technical questions presented to him. It may be that Mr. Shuster and Miss Schaffer would have done no better on these questions, so this comment is not intended to slight Mr. Garvanne. Mr. Shuster exhibited considerable hostility towards the Division's counsel, and he insisted that he had been frightened by telephone calls from Mr. Levie. His testimony, however, belied any such real fear. He may have been angry with Mr. Levie; he may have felt hostile towards Mr. Levie. But certainly he did not exhibit any signs or symptoms of fear, and his own description of the conversations he had had with Mr. Levie makes it clear that Mr. Levie conducted himself in a professional manner in his conversations with Mr. Shuster. Mr. Shuster and Miss Schaffer did not conceal their distrust of the agency. Mr. Garvanne maintained a calm demeanor that did not reflect such distrust.

Mr. James A. Carr was one of the most impressive witnesses

to testify during the proceeding. His hostility towards Division of Enforcement personnel was undisguised, and he, Mr. Carr, insisted that the agency was out to get him, to put his company out of business. The bank matter referred to above was a matter of particular concern with Mr. Carr. This witness clearly did not enjoy testifying at the hearing, and his testimony as a witness was cut short by illness. Whether he intended to appear and testify on March 23 is a matter of conjecture. Despite the generally favorable impression he created as a witness, Mr. Carr seemed to slide over some very important facts during his testimony. And certainly his testimony failed to explain or justify the failure of respondents to promptly and properly register Lloyd Carr Financial or Lloyd, Carr & Co. as a futures commission merchant before the 17th of January; the failure of respondents to see that all salespersons were registered as associated persons on or before January 17; and the failure of respondents to permit authorized inspection of its books and records.

As for the demeanor of Commission witnesses at the hearing, these individuals appeared to be open, candid, and without any prejudice towards respondents. They testified to facts, without regard to the effect the facts would have on this case. It is readily apparent from their testimony that they had no vested interest in the outcome of this proceeding. It could even be surmised that had Mr. O'Brien had his way, Lloyd, Carr & Co.

might well have been registered on the 25th of January. Mr. O'brien made it clear that his position regarding the registration did not mean that he saw no deficiencies in the audit report submitted by Miss Chan, the Commission auditor who had previously audited Financial's books and records. Mr. O'Brien showed considerable candor in stating that the audit request of January 25, 1977, was precipitated by Division of Enforcement, not the Office of Audits. The testimony of all the government witnesses made it quite clear that respondents had not been singled out for persecution by employees of this Commission.

During the first two weeks of hearings it was apparent that no controversy existed between the parties on the issue of whether Lloyd Carr Financial or Lloyd, Carr & Co., its officers and its sales personnel had engaged in the options business since January 17, 1977, while Lloyd, Carr & Co. was not registered as a futures commission merchant. Because the Complaint did not charge respondents with fraud, missuse of customer funds, misrepresentation, or similar practices, it appeared that the issues in this case could have been settled on terms other than putting respondents' operation out of business. After all, scores of people are employed by respondents, and without comment on the economic function of the options industry, there is no question but that to abolish this company would cause great hardship for a number of people. Suggestions to the parties to work out a settlement fell on deaf ears.

Despite clear evidence of gross negligence on the part of respondents in regards to registration, and an indifference to the law and regulations governing commodity options, the Administrative Law Judge felt impelled to make one last effort to get into the record evidence showing present compliance of respondents in the matter of books and records. Post-hearing, respondents were put on notice that the Administrative Law Judge would open and admit into the record an audit report on the status of respondents' books and records. Because of respondents' strident, vehement contention that they were being singled out by the agency for persecution, the Administrative Law Judge offered respondents an opportunity to have the audit done by a certified public accountant to be chosen from a list submitted by respondents. And in addition, the terms of the offer included a provision that any such auditor would receive no instructions from the parties. The only instructions were to be as follows: the certified public accountant would be furnished with copies of regulations 1.18 and 32.7, without any explanation by the parties or the Administrative Law Judge. The CPA would indicate in his report whether or not respondents are in compliance with the regulations as the auditor understands the regulations. Also, the auditor would indicate whether respondents' books and records were being maintained in a business-like manner.

This offer was telephonically communicated to respondents'

counsel on March 24, 1977, and mailed to respondents on the same day. Respondents elected not to avail themselves of this opportunity to place in the record evidence on the current state of Lloyd, Carr & Co.'s books and records. This attitude on the part of respondents destroys the argument that they refused to permit an audit of their books and records because any such inspection would be for other than legitimate purposes. Rather than submit to any regulatory authority, respondents have attempted to make themselves the regulators of this Commission. Respondents take the position that they alone shall determine when an audit shall be conducted; that they alone shall determine the extent of any audit; that they alone shall determine whether an audit is for legitimate purposes. This is, of course, an untenable position, and outside the law.

On more than one occasion during the trial, the Administrative Law Judge remarked to respondents' counsel that he seemed to be putting all his eggs in one basket, i.e., his entire case was geared to the proposition that the Commission regulations were unlawful. The refusal to permit an audit of respondents' books and records by an auditor selected from a list submitted by respondents underscored this attitude.

It may be helpful to comment on some of the arguments raised in respondents' post-hearing brief. Respondents contend, for instance that in December, 1976, respondents were advised by agency staff that there were some "minor" deficiencies

in Lloyd Carr Financial Co.'s application for registration as a futures commission merchant. The truth is that failure to furnish a financial statement is not a "minor" deficiency. And the further truth is that respondents had Lloyd Carr Financial Co.'s application for registration returned to them in October, 1976, and there were many efforts by Commission personnel to get respondents to submit a proper application.

Respondents contend that the agency audit staff failed to furnish respondents with a list of books and records, journals and ledgers that had to be maintained pursuant to Commission regulations. This is contrary to the testimony of the Commission's auditor, Miss Chan, who testified that she apprised respondents of their deficiencies. The truth is that respondents may well have been registered with this Commission had they permitted an audit of their books and records on or about the 25th of January; and this decision would be considerably different in result had respondents permitted an audit of their books and records during or after the hearing. The refusal of respondents to have an audit done by an auditor selected from a list to be submitted by respondents lays to rest any argument that respondents refusal was predicated upon fear of persecution by this agency.

Respondents' contention that they were denied due process in the hearing seems to fly in the face of reality. Respondents made every effort to abort this hearing by order of a federal

court. The contention that holding portions of the hearing in Boston and the final segment in Washington, D.C. violated Commission rules is simply without merit. The truth is that respondents did not want this hearing to take place. Respondents had every available opportunity to put on their case. Hours were wasted, half days were wasted, and full days were wasted solely because counsel for respondents was busy with other matters, or because he saw fit to come to the hearings late, or without witnesses. In short, counsel for respondents protests too much.

Respondents' conduct during and after the trial of this case leaves the clear inference that their books and records are now out of order, and have been out of order since the inception of this proceeding. Even though not charged in the Commission's Complaint, this inference casts an aura of fraud over the entire operation of respondents' business. Any doubt as to the propriety of adopting most of the Division's proposed findings and conclusions of law has been removed by the refusal of respondents to have their books and records audited by an independent auditor of their own selection. There is a real and imminent danger that customers who have invested funds with respondents' business stand to lose most, if not all, of that investment. It is imperative that this Commission take prompt and remedial action to limit the extent of any fraud on the public. In view of the real and probable

dangers to the investing public, the provisions contained in the Orders and Sanctions section of this decision are neither harsh nor oppressive. They serve only to carry out the mission of this agency, and the explicit purposes of the Commodity Exchange Act.

RECOMMENDED CONCLUSIONS OF LAW

1. This Court has jurisdiction over the persons and subject matter of this action by virtue of Sections 6(b), 6(c) and 8a of the Act [7 U.S.C. §§9, 13b and 12a].

2. Since January 17, 1977, Financial and Lloyd, Carr & Co., aided and abetted by Carr and LeMieux, have accepted and continue to accept monies from option customers as payment of the purchase price in connection with commodity options transactions without being registered with the Commission as an FCM. Such conduct violates Section 4c(b) of the Act [7 U.S.C. §6c(b)] and Regulation 32.3(a) thereunder [17 C.F.R. §32.3(a)].

3. Since January 17, 1977, Financial and Lloyd, Carr & Co., aided and abetted by Carr and LeMieux, have solicited and accepted and continue to solicit and accept orders for the purchase or sale of commodity options while not registered with the Commission as an FCM. Such conduct violates Section 4c(b) of the Act [7 U.S.C. §6c(b)] and Regulation 32.3(b)(1) thereunder [17 C.F.R. §32.3(b)(1)].

4. Since January 17, 1977, Financial and Lloyd, Carr & Co., aided and abetted by Carr and LeMieux, have supervised and continue to supervise persons engaged in the solicitation and acceptance of orders for the purchase or sale of commodity options when such persons were not registered as AP's. Such conduct violates Section 4c(b) of the Act [7 U.S.C. §4c(b)] and Regulation 32.3(b)(1) thereunder [7 C.F.R. §32.3(b)(1)].

5. Since January 17, 1977, Financial and Lloyd, Carr & Co., aided and abetted by Carr and LeMieux, have permitted and continue to permit individuals not registered as AP's to associate with them as employees in capacities involving the solicitation and acceptance of orders for the purchase or sale of commodity options, with the knowledge that such persons were not registered as AP's. Such conduct violates Section 4c(b) of the Act [7 U.S.C. §4c(b)] and Regulation 32.3(b)(2) thereunder [17 C.F.R. §32.3(b)(2)].

6. Since January 17, 1977, Financial and Lloyd, Carr & Co., aided and abetted by Carr and LeMieux, have failed to prepare and keep current those books and records required to be kept by Regulations 1.18 and 32.7, promulgated pursuant to the Act [17 C.F.R. §§1.18, and 32.7], thus violating these provisions.

7. On or about January 27, 1977, and March 11, 1977, Lloyd, Carr & Co. refused to permit inspection of its books and records by Commission personnel. This refusal violates

Regulations 1.31 and 32.7(e), promulgated under the Act [17 C.F.R. §§1.31 and 32.7(e)].

8. Based on the violations set forth above, Lloyd, Carr & Co. is unfit to be registered as a futures commission merchant.

9. Based on the violations set forth above, Lloyd Carr Financial Co. is unfit to remain registered as a commodity trading advisor.

10. The violations set forth above which are attributed to Carr and LeMieux as partners in Lloyd Carr Financial Co. and Lloyd, Carr & Co. also constitute individual violations for Carr and LeMieux.

RECOMMENDED ORDERS AND SANCTIONS

1. Lloyd, Carr & Co.'s application for registration as a futures commission merchant should be denied.

2. The registration of Lloyd Carr Financial Co. as a commodity trading advisor should be revoked.

3. The registration of Charles P. LeMieux, III as an associated person should be revoked.

4. Respondents should be ordered to cease and desist the practice of violating the Commodity Exchange Act.

5. Respondents should be prohibited from trading on or subject to the rules of any contract market, and all

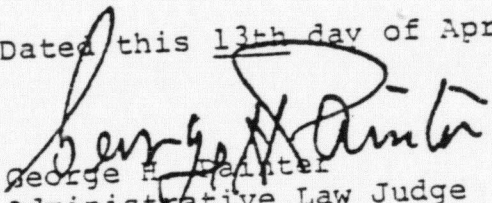
contract markets are hereby ordered to refuse all trading privileges to respondents.

6. Pursuant to Section 6(c) of the Act, James A. Carr should be assessed a civil penalty of \$10,000.00 for violations of the Act and implementing regulations.

7. Pursuant to Section 6(c) of the Act, Charles P. LeMieux, III should be assessed a civil penalty of \$10,000.00 for violations of the Act and implementing regulations.

8. Pursuant to Section 6(c) of the Act, Lloyd, Carr & Co. should be assessed a civil penalty of \$100,000.00 for violations of the Act and implementing regulations.

Dated this 13th day of April, 1977


George H. Painter
Administrative Law Judge



COMMODITY FUTURES TRADING COMMISSION

2033 K Street, N.W., Washington, D.C. 20581

April 18, 1977

CERTIFIED RETURN REQUESTED

Mr. Charles J. Hecht, Esquire
60 East 42nd. Street
Suite 1760
New York, New York 10017

Re: In the Matter of James A. Carr and Charles P. LeMieux,
III, et al - CFTC Docket No. 77-6

Dear Mr. Hecht:

Enclosed please find a copy of the Judge's Order, which
has been received and filed with this office in the above-
entitled proceeding.

Very truly yours,

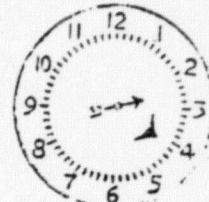
Deedra K. Jones
Hearing Clerk
Office of Hearings and Appeals

Enclosure

cc: William Schief, Dick Levie, ENF
Linda Pedone, OED
ddonato 4/18/77

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APR 12 '77



RECEIVED
CFTC
HEARING

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of

:

JAMES A. CARR and CHARLES P. LeMIEUX III,
d/b/a
LLOYD, CARR & CO., a partnership,
84 State Street
Boston, Massachusetts 02109

LLOYD, CARR FINANCIAL CO.
84 State Street
Boston, Massachusetts 02109

: CFTC Docket No. 77-6

JAMES A. CARR

CHARLES P. LeMIEUX III,

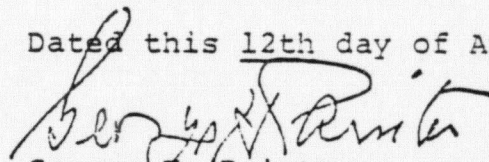
Respondent.

:

ORDER

The record in this proceeding is reopened to admit in
evidence post-hearing affidavits by Irving Winsten and James A. Carr.
Said affidavits are hereby admitted.

Dated this 12th day of April, 1977


George H. Painter
Administrative Law Judge

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UNITED STATES OF AMERICA
before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of

JAMES A. CARR and CHARLES P.
LeMIEUX III, d/b/a
LLOYD, CARR & CO., a partnership,
84 State Street
Boston, Massachusetts 02109

LLOYD, CARR FINANCIAL CO.
84 State Street
Boston, Massachusetts 02109

JAMES A. CARR

CHARLES P. LeMIEUX III,

Respondent.

AFFIDAVIT OF IRWIN WINSTEN

CFTC Docket No. 77-6

State of New York)
) SS.
County of New York)

IRWIN WINSTEN, being duly sworn, deposes and says:

1. I am a partner in Herbert H. Levess & Co., the certified public accounting firm for Lloyd, Carr & Co., the partnership respondent herein.

2. At approximately 2:30 p.m. on March 22, 1977, I received a phone call from Jack Cosulich of Lloyd, Carr & Co., advising me that he was down in Washington, D.C. and that I should be prepared to come to Washington the following day to give testimony in this proceeding. Mr. Cosulich also stated that this would be confirmed by a telephone call from Charles J. Hecht, shortly after the conclusion of that day's

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testimony.

3. At approximately 4:45 p.m. Mr. Hecht called me at the office and notwithstanding that I was in a conference with another client from out of town, I took Mr. Hecht's call and he advised me that I would be needed as a witness the following day and that the judge wanted to commence the next day's hearing at 8:30 a.m.

4. This is the middle of tax season and I had a number of conferences scheduled for the remainder of Tuesday and on Wednesday. I was able to cancel all of the conferences after 7:00 p.m. on Tuesday and my conferences scheduled for Wednesday.

5. I reside in Scarsdale, New York and I did not arrive home from my office until approximately 8:00 p.m. It was not possible to pack and drive to the airport prior to the last flight leaving for Washington. I so advised Mr. Hecht and assured him that I would be on the 7:00 a.m. Eastern Airlines shuttle.

6. Even if deponent could have made the last flight, there were winds of up to 60 m.p.h. and heavy rain and I did not feel it was safe to take the chance of flying in such weather.

7. Deponent took the 7:00 a.m. Eastern Airline shuttle on Wednesday, March 23, 1977 and immediately on arrival took a taxi to 2033 K Street, N.W., where I was advised the hearing was being held.

8. I arrived at the eighth floor of 2033 K Street at approximately 8:33 a.m. and was advised by Mr. Hecht, who met me, that the judge had closed the hearing. Mr. Hecht excused himself to advise the judge of my arrival and subsequently returned and advised me that the judge did not wish to open up the record, and I proceeded back to New York.

Irwin Winsten
Irwin Winsten

Sworn to before me this
23rd day of March, 1977.

HAIG COSTANTINI
Notary Public

HAIG COSTANTINI
Notary Public, State of New York
No. 60-0770375 Qual. Westchester Co.
Commission Expires March, 30, 1978

UNITED STATES OF AMERICA
before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of

JAMES A. CARR and CHARLES P.
LeMIEUX III, d/b/a
LLOYD, CARR & CO., a partnership,
84 State Street
Boston, Massachusetts 02109

LLOYD, CARR FINANCIAL CO.
84 State Street
Boston, Massachusetts 02109

JAMES A. CARR

CHARLES P. LeMIEUX III,
Respondents.

AFFIDAVIT OF JAMES A. CARR

CFTC Docket No. 77-6

State of New York)
) SS.
County of New York)

JAMES A. CARR, being duly sworn, deposes and says:

1. I am one of the respondents herein and am one of the partners in the partnership respondents herein.

2. Tuesday afternoon I was out of the office and returned to my office at approximately 7:00 p.m. Tuesday evening and spoke to Mr. Hecht at 7:20 p.m. He advised me that Judge Painter had set the hearing for 8:30 a.m. the following morning and that Mr. Hecht had scheduled Irwin Winsten as the first witness on Wednesday.

3. He requested that I proceed to Washington, D.C. as soon as possible. I explained to Mr. Hecht that I would

have to drive to my home in Hull, which is approximately 28 miles from the office, to pack my suitcase and I would attempt to obtain the last flight out.

4. I telephoned Eastern Airlines from the office that night to get a reservation on the 7:20 a.m. flight and was told by Eastern that in view of the inclement weather, they advised me to call again to see if flights were leaving from Logan Airport.

5. I left my office shortly thereafter and because of high winds and heavy rains, it took me approximately two hours to get home. The winds were so severe that five windows were blown out of my house, the power was cut off and the phone was inoperable.

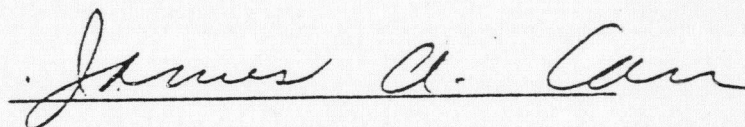
6. Since my phone was inoperable, and it appeared that Logan Airport was closed from the radio reports, I proceeded to drive down to LaGuardia to catch the shuttle from LaGuardia to Washington, D.C. because the radio indicated that the weather was not that bad in New York.

7. I stopped at a telephone booth and called the office at around 10:00 a.m. and was advised that the hearing had been abruptly concluded and that I should proceed directly to Mr. Hecht's office in New York.

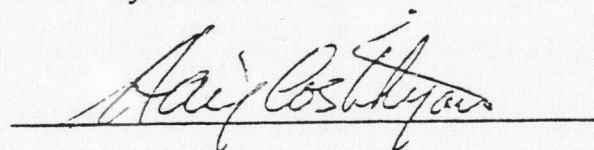
8. During the staff's case, our attorney had advised the tribunal that I would be called on behalf of the respondents and that my testimony would be extensive and extremely important.

9. In addition, since the staff had refused to come to our offices to inspect our books, I had in my possession photostatic copies of the books and records in order to satisfy the subpoena. Those books and records have been left in the custody of my attorney and he is to hold them in escrow and if the staff so requests, they will be furnished as part of the record. Finally, I once again extend my invitation to the audit staff to come to the premises of Lloyd, Carr & Co. provided they come for legitimate audit purposes.

10. I am sorry that this tribunal did not permit the respondents to put in their side of the story.


James A. Carr

Sworn to before me
this 23rd day of March, 1977.



Notary Public

HAIG COSTIGYAN
Notary Public, State of New York
No. 60-0775075 Qual. Westchester Co.
Commission Expires March, 30, 1977

CERTIFICATE OF SERVICE

I hereby certify that on Tuesday, March 29, 1977, I caused to be served two true copies of the within Affidavits of Irwin Winsten and James A. Carr by mail, postage prepaid, to Richard A. Levie, Esq., Commodity Futures Trading Commission, 2033 K Street, N.W., Washington, D.C. 20581.

Gale Krueger
Gale Krueger

UNITED STATES OF AMERICA
before the
COMMODITY FUTURES TRADING COMMISSION

CFTC
OFFICE OF
HEARING CLERK

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In the Matter of

JAMES A. CARR and CHARLES P.
LeMIEUX III, d/b/a LLOYD, CARR
& CO., a partnership
84 State Street
Boston, Massachusetts 02109

LLOYD, CARR FINANCIAL CO.
84 State Street
Boston, Massachusetts 02109

JAMES A. CARR

CHARLES P. LeMIEUX III,

Respondents.

CFTC Docket No. 77-6

MEMORANDUM RELATING TO
RESPONDENTS' AFTER-FILED
EXHIBIT NO. 2

With respect to the alleged improper limitations on the staff's access to Respondents' customer data, enclosed herewith is the recent opinion of Judge Crowley of the United States District Court, Northern District of Illinois, Eastern Division in CFTC v. Rosenthal, which directly supports Respondents' position. In the case, the CFTC never served a subpoena. Respondents' recommendation under the facts was clearly more than what the CFTC would have been entitled to if they had formally subpoenaed the customer records of Lloyd, Carr & Co.

Dated: New York, N.Y.
May 9, 1977

Respectfully submitted,

Charles J. Hecht

Charles J. Hecht
Attorney for Respondents
60 East 42d Street - Suite 1760
New York, New York 10017
212/490-3232

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UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN POWERS CROWLEY

Name of Presiding Judge, Honorable

76 C 3904

Cause No.

Date April 1, 1977

Title of Cause CFTC v. Rosenthal

Brief Statement
of Motion

~~Ruling on Defendant Rosenthal's motion for a~~
~~protective order~~

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and
Addresses of
moving counsel

Representing

Names and
Addresses of
other counsel
entitled to
notice and names
of parties they
represent.

Reserve space below for notations by minute clerk

The defendant Rosenthal's motion for a protective order is granted according to the provisions of the following order: The CFTC will be allowed to contact customers through the means of a written questionnaire. The CFTC is ordered to provide the Court with a draft form of the Questionnaire within 5 days of the entry of this order.

A status report is set for May 5, 1977 at 9:30 a.m for ruling on

(1) the propriety of the proposed questions, (2) the number of questionnaires to be sent, (3) the manner of selection of the customers who will receive the questionnaire, and (4) scheduling and scope of further discovery. (DRAFT)
Hand this memorandum to the Clerk.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COMMODITY FUTURES TRADING)
COMMISSION,)

Plaintiff,)

vs.)

ROSENTHAL & COMPANY, et al.,)

Defendants.)

NO. 76 C 3904

MEMORANDUM OPINION
AND ORDER

John Powers Crowley, District Judge

This cause is now before the Court on the motion of certain defendants seeking a protective order under the provisions of Rule 26(c) of the Federal Rules of Civil Procedure.

The history of this litigation is replete with acrimonious debate between counsel concerning the scope and scheduling of discovery.

This case was filed in late October of 1976 by the Commodity Future Trading Commission (CFTC) against Rosenthal & Company (Rosenthal) and certain partners and employees of Rosenthal seeking injunctive and other relief for alleged violations of the anti-fraud provisions of the Commodity Futures Trading Commission Act, 7 U.S.C. §1-22 (Supp. V,

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1975). The particular violations alleged concern trading in "London options". London options are not futures contracts but are a more speculative investment in options on futures contracts for commodities traded through the London Metals Exchange or transactions on other exchanges cleared through the International Commodity Clearing House.¹

The Court was ready to proceed with an evidentiary hearing on the request for preliminary relief in early November. However, negotiations between the parties led to the execution of preliminary relief by consent, without any admissions of wrongdoing or fraud by any of the defendants. A series of pre-trial conferences, both formal and informal, then followed. Among the issues discussed, at length, were the scheduling and scope of hundreds of depositions that the parties wished to take in preparation for the hearing on the merits of the allegations of the complaint.

To the Court's everlasting regret the procedures of the Manual For Complex Litigation, 1 Pt. 2 Moore's Federal Practice, were not employed from the outset. This case clearly falls within the definitions of "complex". 1 Pt. 2 Moore's Federal Practice, Part I §0.10, 0.22(b)(c) and (k).

The results of the Court's failure to employ the various suggestions of the Manual have been to require the Court and the parties to expend inordinate amounts of time in ruling on essentially simple matters. The parties have burdened themselves and the Court with disputes concerning

production of documents, answers to interrogatories and the scheduling and mode of taking depositions.²

This now brings us to the matter before the Court. The CFTC served the defendants with interrogatories requesting Rosenthal to provide a list of its customers who have purchased "London options". Rosenthal in its motion for a protective order states that it has provided such a list consisting of thousands of customers, but seeks this Court's order prohibiting CFTC from contacting these customers in any manner chosen by the CFTC. Rosenthal suggests that only a representative sampling be contacted. CFTC objects to any form of order, asserting that such an order would constitute "undue interference or restraint" on its discovery in this cause.

In support of its position the CFTC has relied on American International Trading Co. v. Bagley, 536 F. 2d 1196 (7th Cir. 1976) and S.E.C. v. Brigadoon Scotch Distributing Co., 480 F. 2d 1047 (2nd Cir., 1973), cert. denied, 415 U.S. 915 (1974). Both cases however, deal with the proper scope of investigatory procedures and the jurisdiction of the Courts to interfere with or enjoin those procedures in the absence of an actual case or controversy pending before an Article III Court. They certainly cannot be read as authorizing the type of unmonitored discovery sought here.

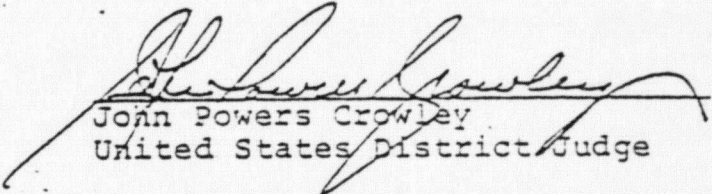
The defendants seek the protection of the Federal Rules of Civil Procedure to avoid serious adverse consequences to their business, prior to any resolution, by the court, of the allegations of the complaint. cf: Smith, Kline & French Laboratories v. Bennett Co., 3 F.R.D. 51 (E.D. Pa. 1943); Volkswagenwerk Aktiengesellschaft v. Westburg, 260 F. Supp. 636 (E. D. Pa. 1966).

In view of the questions asked during the investigation in American International Trading,³ this Court cannot confidently predict that such questions would not be asked here.

However, considering the aspects of public protection intertwined with this litigation, it is clear that the CFTC should be permitted to contact customers in a manner that would provide adequate discovery for the Commission without concurrently precipitating the economic destruction of the defendants.

Therefore, the CFTC will be allowed to contact customers through the means of a written questionnaire. The CFTC is ordered to provide the Court with a draft form of the questionnaire within five (5) days of the entry of this order. This matter will be set for status on May 5, 1977, at 9:30 a.m. for ruling on (1) the propriety of the proposed questions, (2) the number of questionnaires to be sent, (3) the manner of selection of the customers who will receive

the questionnaire and (4) the scheduling and scope of further discovery.


John Powers Crowley
United States District Judge

DATED: April 26, 1977

¹ For an excellent discussion of this market see British American Commodity Options Corp. et al. v. Bagley, et al., ___ F. 2d ___ (2nd Cir. 1977) (April 4, 1977)

² The docket sheet in this cause consists of twenty (20) pages of entries. In addition there have been numerous conferences in chambers and the parties have telephonically communicated with the Court in order to attempt to obtain rulings on discovery being conducted outside the Northern District. The following are an illustrative but by no means exclusive sampling of motions relating to discovery:

10-29-76	Motion for production of documents
11-4-76	Motion to compel answers to interrogatories
11-4-76	Protective order re: further disposition of plaintiff's investigative personnel.
11-16-76	Motion re: protective order on scheduling of a deposition
12-3-76	Motion re fees and expenses relating to depositions
12-29-76	Motion to compel answers to interrogatories, production of documents and stay taking of depositions
1-4-77	Motion to answer interrogatories in abbreviated form.
1-26-77	Motion for protective order
1-28-77	Motion to compel production of documents
2-3-77	Motion to compel production of documents
2-4-77	Motion for protective order

3

- 1) Who was your Account Executive?
- 2) What did he promise you in the way of percentage of return?
- 3) He must have made some pitch to induce you to become a client.
- 4) Are you sure he did not give you a sales pitch?
- 5) How much money did you put into your account?

AUG 1 1977

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

August 1, 1977

RECEIVED
CFTC

In the Matter of	:	CFTC Docket No. 77-6 HEARING OFFER
	:	
JAMES A. CARR and	:	
CHARLES P. LeMIEUX, III d/b/a	:	
LLOYD, CARR & CO., a partnership	:	
	:	
JAMES A. CARR and	:	
CHARLES P. LeMIEUX, III d/b/a	:	
LLOYD CARR FINANCIAL CO.	:	
	:	
JAMES A CARR	:	
	:	
CHARLES P. LeMIEUX, III	:	
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OPINION OF THE COMMISSION

This case is before the Commission for a decision on the merits in the first instance. In an Order dated March 2, 1977, and supplemented on March 23, 1977, the Commission, finding that the public was entitled to be protected at the earliest possible date against unregistered persons and firms soliciting and accepting orders and monies for commodity option transactions in violation of the Commodity Exchange Act and the Commission's regulations, waived its Rules of Practice, 17 C.F.R. §§10.1-10.108 (1977), and expedited hearing of this matter. The Commission's Orders set forth abbreviated Rules of Practice and directed the Administrative Law Judge, upon conclusion of the hearing and preparation of a recommended decision, as distinguished from an initial decision, to certify and transmit to the Commission the full record of the proceedings for decision by the

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Commission.^{1/} On April 13, 1977, Administrative Law Judge George H. Painter filed his recommended decision ("Recommended Decision"), and, after counsel for respondents had filed his exceptions to the Recommended Decision, the record was certified to the Commission on April 19, 1977, for its consideration and decision.

On February 3, 1977, the Commission instituted an administrative proceeding against Lloyd, Carr & Co. and Lloyd Carr Financial Company ("Lloyd Carr Financial"), Massachusetts partnerships, and their two general partners, James A. Carr ("Carr") and Charles P. LeMieux, III ("LeMieux"), pursuant to Sections 6(b), 6(c), 8a(2) and 8a(3) of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C. §§9, 13b, 12a(2) and 12a(3) (Supp. V, 1975), following receipt of an application for registration of Lloyd, Carr & Co. as a futures commission merchant. First, the complaint charged that since January 17, 1977, Lloyd, Carr & Co., aided and abetted by respondents Carr and LeMieux,^{2/} had accepted and continued to accept monies, securities or other property from customers in payment for commodity options

^{1/} The expedited procedures adopted provided for the filing of proposed findings of fact and conclusions of law prior to the entry of a recommended decision by the Administrative Law Judge, and for the noting of exceptions to the recommended decision before certification and transmission to the Commission.

^{2/} Section 13(a) of the Act, 7 U.S.C. §13 c (Supp. V, 1975), basically provides that any person who commits, or who willfully aids or abets in any violation of the Act or the Commission's rules, regulations or orders "may be held responsible in administrative proceedings under this Act for such violation as a principal."

without being registered with the Commission as a futures commission merchant, in violation of Section 4c(b) of the Act, 7 U.S.C. §6c(b) (Supp. V, 1975)^{3/}, and Sections 32.3(a) and (b) of the regulations thereunder^{4/} (Paragraphs II(A) and (B) of the complaint). Next, the

3/ Section 4c(a) of the Act prohibits commodity option transactions involving any of the commodities enumerated in Section 2(a)(1) of the Act; prior to the enactment of the Commodity Futures Trading Commission Act of 1974 (Pub. L. 93-463, 88 Stat. 1389 (1974)). With respect to all other commodities regulated under the Act, Section 4c(b) gives the Commission the authority either to ban all options transactions involving those commodities or to permit those transactions on such terms and conditions as the Commission shall prescribe. In pertinent part Section 4c(b) provides:

. . . (b) No person shall offer to enter into, enter into, or confirm the execution of, any transaction subject to the provisions of subsection (a) of this section involving any commodity regulated under this Act, but not specifically set forth in section 2(a) of this Act, prior to the enactment of the Commodity Futures Trading Commission Act of 1974, which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty", contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe

Section 2(a)(1) of the Act, 7 U.S.C. §2, defines "person" to include "individuals, associations, partnerships, corporations, and trusts." See also Section 1.3(u) of the Commission's regulations, 17 C.F.R. §1.3(u).

4/ Pursuant to the authority conferred by Section 4c(b), the Commission has adopted interim regulations to govern commodity option transactions. 41 Fed. Reg. 51808, 51814-51817 (November 24, 1976). Sections 32.3(a) and (b) of these regulations, 17 C.F.R. §§32.3(a) and (b) (1977), provide:

(a) On and after January 17, 1977, it shall be unlawful for any person to accept any money, securities, or property (or to extend credit in lieu thereof) from an option customer as payment of the purchase price

(footnote continued)

complaint charged that respondents knowingly had supervised and permitted persons associated with Lloyd, Carr & Co., who were not registered with the Commission as associated persons, to engage in the solicitation and acceptance of orders for the purchase of commodity options on its behalf in violation of Section

4/ (Footnote continued)

in connection with a commodity option transaction unless such person is registered as a futures commission merchant under the Act and such registration shall not have expired, been suspended (and the period of suspension has not expired) or revoked.

(b) On and after January 17, 1977, it shall be unlawful for:

(1) Any person to solicit or accept orders (other than in a clerical capacity) for the purchase or sale of any commodity option, or to supervise any person or persons so engaged, unless such person is:

(i) Registered as a futures commission merchant under the Act, or

(ii) If such person is an individual, registered as an associated person of a specified futures commission merchant under the Act;

and such registration shall not have expired, been suspended (and the period of suspension has not expired) or revoked; and

(2) Any futures commission merchant to permit an individual to become or remain associated with such futures commission merchant as a partner, officer or employee (or in any similar status or position involving similar functions) in any capacity involving such solicitation, acceptance or supervision if such futures commission merchant knew or should have known that such individual was not registered as an associated person or that such registration has expired, been suspended (and the period of suspension has not expired) or revoked

4c(b) of the Act and Section 32.3(b) of the regulations thereunder (Paragraph II(C) of the complaint). Third, the complaint averred that Lloyd, Carr & Co., again aided and abetted by Carr and LeMieux, had failed to prepare and keep current proper books and records as required by Sections 1.18 and 32.7 of the Commission's regulations (Paragraphs II(D) and (E) of the complaint). Fourth, Lloyd, Carr & Co. was charged with refusing to permit Commission personnel to inspect its books and records on January 27, 1977, in violation of Section 4c(b) of the Act and Sections 1.18, 1.31 and 32.7 of the Commission's regulations thereunder^{5/} (Paragraph II(F) of the complaint).

The sanctions sought in the complaint include the denial of Lloyd, Carr & Co.'s application for registration as a futures commission merchant pursuant to Section 8a(2) of the Act, revocation of Lloyd Carr Financial's registration as a commodity trading advisor^{6/} pursuant to Sections 6(b) and 8a(3) of the Act, and imposition of civil money penalties of \$100,000 for each violation against each of the two partnerships and Carr and LeMieux personally pursuant to

^{5/} Section 1.18, 17 C.F.R. §1.18 (1977), of the Commission's regulations imposes book- and record-keeping requirements upon those who apply for registration as futures commission merchants. In addition, Section 32.7 of the Commission's options regulations, 17 C.F.R. §32.7 (1977), imposes book- and record-keeping requirements upon those persons who accept money, securities, or property from an options customer in connection with commodity options transactions. Sections 1.31, 17 C.F.R. §1.31, and 32.7(e), 17 C.F.R. §32.7(e) (1977), require that all such books and records be open to inspection by representatives of the Commission or the Department of Justice.

^{6/} Lloyd Carr Financial has been registered with the Commission as a commodity trading advisor since November 19, 1976. Section III of the complaint imputed the alleged violations of the Act of respondents Carr and LeMieux to Lloyd Carr Financial and therefore challenged Lloyd Carr Financial's fitness to remain registered.

Section 6(b) of the Act. The complaint also requested a cease and desist order pursuant to Section 6(c) of the Act and a prohibition against respondents trading on or subject to the rules of any contract market pursuant to Section 6(b) of the Act.

The hearing was held before Judge Painter on nine diverse days between March 9, 1977, and March 23, 1977, on which latter date Judge Painter terminated the hearing.^{7/} In his thirty-four-page Recommended Decision, the Administrative Law Judge found respondents to be in

^{7/} Initially, the hearings were held in Boston. However, on March 17, 1977, without objection from respondents, Judge Painter determined to reconvene the proceedings on March 21, 1977, in Washington, D.C., and all further proceedings were held there.

The hearing was terminated before respondents had completed their case. In his Recommended Decision, Judge Painter explained his ruling closing the hearing as he did:

Solely to accommodate respondents, or counsel for respondents, this hearing opened on March 9 rather than March 8; the hearing was recessed on March 10 and 11 to permit respondents' counsel to tend to other legal chores; the hearing was reconvened on March 15 rather than March 14 to permit respondent Carr and respondent's counsel an opportunity to attend a hearing in Canada; the hearing on March 21 ended at 10:50 due to the failure of LeMieux to appear as a witness; the hearing recessed early on March 22 due to failure of respondents to have witnesses available; the hearing was terminated at 8:32 a.m. on March 23 due to respondents refusal to comply with a direct, specific order to have witnesses available at 8:30 a.m. to begin testimony [Respondent's Telegraphic Motion, March 4, 1977, Respondent's Telegraphic Motion, March 11, 1977, Tr. 726-729, 732, 812-817, 819]. (Recommended Decision at 13-14).

See pp. 41-44, infra.

violation of the Act and regulations as charged and recommended to the Commission that Lloyd, Carr & Co.'s application for registration as a futures commission merchant be denied, that Lloyd Carr Financial's registration as a commodity trading advisor be revoked, that LeMieux's registration as an associated person be revoked, that civil money penalties of \$100,000 against Lloyd, Carr & Co. and \$10,000 each against Carr and LeMieux individually be imposed, that respondents be ordered to cease and desist from violating the Commodity Exchange Act, and that respondents be prohibited from trading on or subject to the rules of any contract market.

We find by a preponderance of the evidence that respondents have violated the Act and Commission regulations as charged. Haltmier v. Commodity Futures Trading Commission, 554 F.2d 556, 560 (2d Cir. 1977). Although we agree in large measure with the findings of fact suggested by the Administrative Law Judge, we have set forth our factual findings independently, based upon our review and analysis of the record as a whole. In our view, the record supports the denial of Lloyd, Carr & Co.'s application for registration as a futures commission merchant, revocation of the registration of Lloyd Carr Financial Company as a commodity trading advisor, and the issuance of an order directing respondents to cease and desist from violating the Commodity Exchange Act and the Commission's regulations thereunder, as charged. However, for the reasons set forth in Section III of this Opinion, the Commission has determined not to impose any civil money penalties upon respondents, or to prohibit respondents from trading on

or subject to the rules of any contract market, or to revoke the registration of LeMieux as an associated person.^{8/}

I. THE FACTS

A. The Partnership Structure

Lloyd, Carr & Co. was founded in mid-1976 by James A. Carr as a sole proprietorship, with its principal place of business in Boston, Massachusetts. However, in mid-January 1977, Carr reconstituted Lloyd, Carr & Co. as a partnership between Carr and LeMieux as general partners.^{9/} From July 1976 to the date of the hearing, Lloyd, Carr & Co. engaged in the business of soliciting and accepting orders and monies from the public for the purchase of "London" commodity options.^{10/} Lloyd Carr Financial has been a partnership between respond-

^{8/} Prior to the Commission's consideration of this case, it considered respondents' motion to disqualify Chairman Bagley and Vice-Chairman Rainbolt and the request made by counsel for respondent on the last page of his exceptions to the Recommended Decision for presentation of oral argument. Respondents' motion neither alleged any personal bias on the part of the Chairman or Vice-Chairman nor contained any facts that would convince a reasonable man that such bias existed. Cf. Parriş v. Board of Commissioners of the Alabama State Bar, 524 F.2d 98, 100 (5th Cir. 1975); United States v. Thompson, 483 F.2d 527, 529 (3rd Cir. 1973). In addition, neither the Commission as a whole, nor Chairman Bagley and Vice-Chairman Rainbolt individually, could discern independently any basis for a claim of bias in this case. Therefore, the motion to disqualify was denied. The Commission also determined that, especially in view of the expedited nature of this case, it would not permit oral argument by any of the parties.

^{9/} See pp. 14-15, infra.

^{10/} These are London commodity exchange options cleared through the International Commodity Clearing House and commodity options written by or through members of the London Metal Exchange. See 41 Fed. Reg. 44561 (October 8, 1976). See also British American Commodity Options Corp. v. Bagley, 552 F.2d 482, 485 (2d Cir. 1977).

ents Carr and LeMieux as general partners from its inception in late July or early August 1976. Its offices and principal place of business are identical to Lloyd, Carr & Co.'s and both firms engaged in the commodity options business, indeed, conducted this business interchangeably, until the mid-January 1977 reconstitution of Lloyd, Carr & Co. as a partnership, at which time Lloyd Carr Financial's commodity options business and assets were taken over by Lloyd, Carr & Co.^{11/} On November 19, 1976, Lloyd Carr Financial was registered with the Commission as a commodity trading advisor. However, Lloyd, Carr & Co., while it has applied for registration as a futures commission merchant, has never been registered with the Commission in any capacity. Carr, who is not registered with the Commission individually, undertakes primary responsibility for the firm's day-to-day policy decisions. LeMieux's duties include more technical, administrative functions, such as sales and the training of salespersons. LeMieux is registered with the Commission as an associated person.^{12/}

B. Events Prior to January 17, 1977

On October 1, 1976, the Commission received an application for registration as a futures commission merchant from Lloyd Carr Financial

^{11/} Carr explained that he had formed Lloyd Carr Financial as a partnership with LeMieux because he wanted to give LeMieux, in view of the latter's "considerable talent and integrity," an opportunity to be in business with Carr without risking any portion of Lloyd, Carr & Co., the company which Carr had originally founded. (Hearing transcript at 222-223).

^{12/} LeMieux, who is primarily based in Montreal, Canada, is apparently in charge of the day-to-day operations of yet another entity owned by Carr and LeMieux, Lloyd Carr of Canada. The activities of Lloyd Carr of Canada are not relevant to this proceeding.

(Division of Enforcement ("Division") Exhibit 9(a)). By letter dated October 12, 1976, the Commission staff returned the application to James A. Carr at Lloyd Carr Financial because the application, among other things, failed to include the required statement of financial condition (Form 1-FR), and it was undated. These deficiencies were noted in the Commission's letter (Division Exhibit 10).^{13/}

On October 8, 1976 and November 24, 1976, respectively, the Commission published proposed and final interim commodity options regulations in the Federal Register. As proposed and adopted, the rules basically provided, among other things, that on and after January 17, 1977, it would be unlawful for (1) any person to offer or sell commodity options, or accept money from option customers, unless the person were registered as a futures commission merchant; or (2) any individual to solicit or accept orders for commodity options unless registered as an associated person of a futures commission merchant.^{14/} The main body of the rules, including the registration provisions, became effective on December 9, 1976. To allow persons sufficient

^{13/} Section 1.10 of the Commission's regulations, 17 C.F.R. §1.10, requires that all applications submitted by persons seeking registration as futures commission merchants be accompanied by a completed Form 1-FR, financial statement setting forth the applicant's capital, net worth, assets and liabilities.

^{14/} 41 Fed. Reg. 45560 (October 8, 1976); 41 Fed. Reg. 51808 (November 24, 1976). See footnote 3, *supra*, for the full text of these provisions. Lloyd Carr Financial originally submitted its application for registration as a futures commission merchant, not in conjunction with its commodity option business, but because it proposed to engage in activities involving commodity futures contracts traded on contract markets which requires registration as a futures commission merchant.

time to submit, and for the Commission to process, applications, the registration deadline was set as January 17, 1977. At the hearing, Carr conceded that he was familiar with the regulations both as proposed and adopted; that he understood at the time that what he termed the Lloyd Carr "group", an apparent reference to the amalgam of both Lloyd, Carr & Co. and Lloyd Carr Financial, would have to register as a futures commission merchant by January 17, 1977, in order to continue selling options lawfully; that the registration process was expected to take thirty to sixty days;^{15/} and that the book- and record-keeping requirements were to become effective on December 9, 1976, although he was unfamiliar with the specific nature of those requirements.

While admitting that he had prior expertise in business and familiarity with the need to comply with governmental regulations, Carr acknowledged at the hearing that Lloyd Carr Financial's application was not resubmitted to the Commission until January 17, 1977. According to Carr, LeMieux had been assigned the responsibility of obtaining the proper registration. By Carr's own testimony, Carr learned that the application had been returned as early as November or December 1976, when he was informed of the return by LeMieux. LeMieux told

^{15/} In both its October 8, 1976, proposal and its November 24, 1976, announcement of the adoption of the options regulations, the Commission warned that an applicant should expect the registration process to take from thirty to sixty days and urged affected persons to submit their applications on a timely basis. See 41 Fed. Reg. 44563 (October 8, 1976) and 41 Fed. Reg. 51810 (November 24, 1976).

Carr at that time that he, LeMieux, had tried unsuccessfully to determine why the Commission had returned the application.

One member of the Commission staff spoke with Carr by telephone about the application in November 1976, informed Carr of the deficiencies in the application, inquired when Lloyd Carr Financial would resubmit its application, and noted that no processing would occur during the interim. Carr told the staff member that Carr would contact him about the application within a week. Upon hearing nothing from respondents, the staff member called Carr in mid-December and again informed Carr that the Commission had not received Lloyd Carr Financial's application and financial statement. On yet another occasion, December 22, 1976, respondents' attorney called the same staff member and was advised that Lloyd Carr Financial's application and financial statement still had not been resubmitted to the Commission.

Thus it is clear beyond dispute that by December 1976, respondents had notice of the new commodity option rules requiring registration of commodity option dealers as futures commission merchants by January 17, 1977, of the thirty to sixty days' processing time required for applications, and of the defects in the October application. Yet, despite the return of Lloyd Carr Financial's application for registration as a futures commission merchant on October 12 and the repeated attempts by the Commission staff to solicit a timely and complete resubmission, Lloyd Carr Financial's application and the

required Form 1-FR were not resubmitted to the Commission until January 17, 1977, the registration deadline.

C. Events After January 17, 1977

In response to the application filed on January 17th, two Commission staff auditors went to Lloyd Carr Financial's Boston headquarters on January 20 and 21, 1977, for a pre-registration examination of its books and records. The auditors discovered a number of discrepancies between the data contained in the Form 1-FR (Division Exhibit 23), some of which were estimated, and the supporting schedules provided by Lloyd Carr Financial's personnel.^{16/} The auditors were told by Lloyd Carr Financial's accountant that the firm lacked trial balance or general ledgers and cash receipt and disbursement journals.^{17/} The auditors were therefore unable to verify monies received from option sales. Nor did Lloyd Carr Financial have current records supporting its liability, income or expense accounts. Carr and the firm's accountant were informed that, at that time, Lloyd Carr Financial's books were not being prepared or maintained in accordance with the Commission's regulations. As a consequence, the firm's financial

^{16/} When an auditor asked for schedules supporting the Form 1-FR, respondents' accountant prepared them on the spot on January 20. However, these schedules did not adequately support the Form 1-FR. Because of these discrepancies, an amended Form 1-FR was executed and presented to the auditors on January 20.

^{17/} When Carr produced the firm's "books and records" during the audit, he provided bank statements, carrying brokers' month-end statements and customer option order forms "in a box, and also some three by five index cards which shows (sic) the options order for the customers" (Hearing transcript at 370).

condition could not be accurately established on the basis of the books and records provided. See Sections 1.18 and 32.7 of the Commission's regulations (17 C.F.R. §§1.18, 32.7 (1977)). While the firm's accountant assured the Commission's auditor that the books and records would be adequate in the near future, "maybe a week or so," such assurance amounts to an admission that the books and records were not in compliance with the Commission's bookkeeping requirements at that time, and, thus, did not satisfy a prerequisite to registration as a futures commission merchant.

Over the weekend following the audit, one of the Commission's auditors, upon reviewing the audit work papers, discovered additional irregularities. It appeared that Lloyd Carr Financial claimed as assets monies in bank accounts of both Lloyd Carr Financial and of Lloyd, Carr & Co.^{18/} This discovery was brought to the attention of the auditor's supervisors on Monday morning, January 24. At the time of this discovery and its disclosure to the auditor's supervisors, the Commission's staff was unaware that Lloyd Carr Financial and Lloyd, Carr & Co. were held out to the public as being one and the same. In view of the condition of Lloyd Carr Financial's books and records and the confusion over commingling of funds of both Lloyd, Carr & Co. and Lloyd Carr Financial in the context of a single registration application, one of the auditor's supervisors became uncertain whether Lloyd Carr Financial satisfied the minimum financial requirements of Section

^{18/} During the hearing, Carr disclosed that at least one of the bank accounts was used by him as a personal account and that at various times sums of money were withdrawn from another account by both Carr and LeMieux as their profits.

1.17(b) of the Commission's regulations, 17 C.F.R. §1.17(b) (1977).^{19/}
As a result, he telephoned Carr on or about January 24, 1977, and informed him of the staff's concern over the discrepancies in the bank accounts and its adverse effect on Lloyd Carr Financial's application. He suggested to Carr that a revised application be submitted that would accurately reflect the applicant's true financial condition and ownership of assets. On January 25, 1977, a new futures commission merchant application and Form 1-FR were submitted to the Commission, this time in the name of Lloyd, Carr & Co., which was identified on the application as a Massachusetts partnership. Between January 24 and 26, Carr provided documentation to the staff

^{19/} Any person who wishes to engage in commodity options activities requiring registration as a futures commission merchant under the Commission's regulations must satisfy the Commission that he meets the minimum financial requirements which the Commission has imposed. This requirement "is necessary to provide a cushion against losses which could arise as a result of any number of factors, such as dishonesty, incompetence, insufficient or inadequate segregation" (41 Fed. Reg. 44565 (October 8, 1976)). Cf. Blaise D'Antoni & Associates v. Securities and Exchange Commission, 290 F.2d 688, 689 (5th Cir. 1961); Blaise D'Antoni & Associates v. Securities and Exchange Commission, 289 F.2d 276, 277 (5th Cir.) cert. denied 368 U.S. 899 (1961). While respondents are not charged with having failed to satisfy the minimum financial requirements, the deficiencies in the books and records become a great deal more critical when the cumulative result is to make an accurate assessment of an applicant's capital structure and financial condition impossible. The purpose of book- and record-keeping requirements is to permit a regulatory agency to discover whether those who are regulated are abiding by their regulatory obligations. See Robert H. Davis, 40 SEC 994 (1962); see also Securities and Exchange Commission v. Mainland Securities Corp., 192 F. Supp. 862 (S.D.N.Y. 1961).

evidencing that the assets previously shown as owned by Lloyd Carr Financial had been transferred to Lloyd, Carr & Co.

Because the audit staff had been unable to establish compliance with Commission regulations during the original audit (which had been performed on Lloyd Carr Financial's books), a member of the staff telephoned Carr on January 26 and proposed that a second audit be conducted on the new applicant's books the following day, January 27, to verify that all regulatory criteria had been met. During this conversation, Carr was informed that a number of representatives of the Commission's Enforcement Division would participate in the audit. Carr expressed reservations and arranged a conference telephone call between the Commission's staff and respondents for later that afternoon. During that call Carr and his counsel informed the staff that they would not permit a second audit involving Enforcement Division personnel until Lloyd, Carr & Co. was registered by the Commission.

On January 20, 1977, three days after the registration deadline, the Commission received applications for registration as associated persons of thirty-eight employees of Lloyd, Carr & Co., none of whom had previously been registered with the Commission. Despite Carr's acknowledgment that he understood that employees who solicited orders for commodity options were required to be registered by January 17, his understanding that it was improper for them to solicit or accept orders from customers without such registration on and after that date, and his control over the activities of the firm's employees,

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he did not instruct the employees to cease activities.^{20/} Rather, he knowingly permitted the firm's employees to continue to solicit and accept orders pending processing of their applications for registration as associated persons.

At no time did respondents maintain that they stopped doing business on and after January 17. Carr acknowledged the continuing nature of his firm's business and admitted that the decision to continue offering and selling options after January 17, 1977, was knowing and deliberate.^{21/} Three Division of Enforcement witnesses, who were salespersons of Lloyd, Carr & Co. and were not registered as associated persons during the relevant period, testified about their extensive post-January 17 solicitations and sales. One estimated during her testimony that she solicited approximately 1,500 to 2,500 persons between January 17 and the hearing in her efforts to sell options; another contacted between 1,000 and 2,000 persons during the same

^{20/} Carr asserted that he was confused by the no-action positions taken by the Commission regarding persons whose applications as associated persons were pending. However, the published statements of the Commission on the matter establish unequivocally that in order for an applicant to receive no-action treatment, its application had to be filed with the Commission by December 27, 1976. See Division Exhibits 28, 34; 42 Fed. Reg. 3699 (January 19, 1977).

^{21/} In response to a series of questions by counsel for the Division of Enforcement, Carr stated flatly that on or about "the 17th or the 18th or the 19th" of January, he and LeMieux decided to continue selling options:

Q (Counsel for the Division) -- And were any decisions made at those discussions between you and Mr. LeMieux?

A (Mr. Carr) -- I think the decision is obvious, Mr. Levie. We continued to sell options.

(footnote continued)

period; and the third contacted between 50 and 100 persons per day.^{22/}

One customer testified that he dealt with respondent Carr directly.

While at one point Carr testified that his partnership stopped doing business for three or four days after January 17, it appears that he meant only that the firm placed no orders for execution with its London brokers, not that it had stopped soliciting and accepting orders or money from customers. Indeed, the firm's options order forms introduced into evidence detail the orders for commodity options accepted by Lloyd, Carr & Co. during that very period and thereafter. At some point during the week of January 24, respondents resumed doing business as usual, i.e., both accepting customer orders and monies and transmitting those orders for execution in London.^{23/}

21/ (Footnote continued)

Q (Counsel for the Division) — And did Mr. LeMieux concur in that decision? Was it a joint decision between you and Mr. LeMieux?

A (Mr. Carr) — I--I--it was the kind of decision that is kind of familiar to me. It was a foregone conclusion that we would. (Hearing transcript at 605.)

22/ We adopt the Administrative Law Judge's recommended findings 36 and 37, where he computes respondents' receipts from the sale of commodity options between January 17 and March 2, 1977, to be approximately \$787,009.

23/ In his discussion of the facts and the testimony adduced during the course of the proceeding, Judge Painter discussed in general terms the credibility and demeanor of the witnesses, their motivations and their fears and bias. For instance, the Judge characterized Commission witnesses as "open, candid, and without any prejudice toward respondents" (Recommended Decision at 25). The Judge also found respondent Carr to be an "impressive witness," despite his undisguised hostility towards the Division of Enforcement. However, the Judge noted that ". . . Mr. Carr seemed to slide over some very important facts during his testimony" (Recommended Decision at

(footnote continued)

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II. THE COMMISSION'S CONCLUSIONS.

A. Respondents were offering and selling commodity options unlawfully on and after January 17, 1977.

Respondents have not contested that on and after January 17, 1977, they have engaged in the business of soliciting customers for the sale of commodity options, accepting orders and monies therefor, and have done so on a large volume. In addition, it has been conceded that most of Lloyd, Carr & Co.'s salespersons who engaged in these solicitations were not registered as associated persons by January 17. According to Carr, he and Lemieux made an affirmative decision to continue their business activities and the activities of the salespersons on and after January 17, 1977, despite prior knowledge of the regulatory prohibitions against such conduct. Therefore, respondents have knowingly and willfully violated the Commission's regulations and, thus, Section 4c(b) of the Act.

But respondents have argued that their conduct was not unlawful for a number of reasons. First, they contend that as of January 17, Lloyd Carr Financial met all of the qualifications required for registration as a futures commission merchant, and since the Commission's staff presumably ascertained this during the pre-registration

23/ (Footnote continued)

25). Judge Painter characterized two of the three salespersons who testified at the hearing as being above average in intelligence and articulate. He also found a considerable amount of distrust of the Commission manifested in their testimony. On the other hand, the third salesperson "maintained a calm demeanor that did not reflect such distrust" (Recommended Decision at 24).

audit of that firm on January 20-21 and their inquiries during the following week, the partnership should have been registered immediately. It is clear that respondents' argument is not supported by the record.

On January 20 and 21, 1977, the Commission's staff undertook an audit of the applicant's books and records to assure that they were prepared and maintained in accordance with the Commission's regulations. They were not.^{24/} The books and records presented by the applicant failed to account for its asset, liability and capital accounts either as reported by it on Commission Form 1-FR or according to generally accepted accounting principles as required by Section 1.18 of the Commission's rules, and otherwise were not prepared or maintained as required by Section 32.7 of the Commission's rules. In addition, the Commission's auditors discovered commingling of monies between Lloyd Carr Financial and Lloyd, Carr & Co. Carr admitted during the hearing that he also had used at least one of the accounts for personal business. Such practices make it extraordinarily difficult, if not impossible, to ascertain a firm's financial condition, which is a basic requisite for registration as a futures commission merchant. The inability to establish satisfaction of these financial requirements calls into question the availability of the funds to satisfy claims by customers who may have been doing business with one

^{24/} We note that the book- and record-keeping requirements of the Commission's option regulations became effective on December 9, 1976. Thus, even while Lloyd Carr Financial was registered as a commodity trading advisor and doing business prior to January 17, 1977, it may have been in violation of requirements imposed over one month earlier, i.e., in violation between December 9, 1976, and the futures commission merchant registration deadline of January 17.

or the other of the entities, but not both.^{25/} To have permitted Lloyd Carr Financial to be registered in these circumstances would have been to ignore the express requirements of the Commission's regulations and would have been a violation of the Commission's duty to protect the public interest.

On and after January 17, respondents' business continued — and their intentional, willful violation of the Act and regulations commenced. Between January 20 and January 25, the staff informed Carr of the questions raised during the application and audit process and endeavored to assure that the deficiencies were rectified. To be certain that all was in order before permitting registration based on the new application submitted in the name of Lloyd, Carr & Co. on January 25, given the disarray found during the first audit and the irregularities discovered immediately thereafter, on January 26, the staff requested a second audit, this time with the participation of Division of Enforcement personnel. Respondents refused on the grounds that there was no legitimate purpose for it.

Thus, the Commission has never been able to determine that either of the applicant firms met all of the qualifications required for registration as a futures commission merchant. Lloyd Carr Financial's books and records were not in compliance with the Commission's regulations, or even with customary bookkeeping practices, on the date of the first audit. While the inquiries conducted during the

^{25/} As we noted in footnote 19, it is this customer protection aspect that led the Commission to impose the minimum capital requirements of Section 1.17 of its regulations.

following week indicate an attempt to remedy the deficiencies noted by the Commission's staff, it was certainly not unreasonable -- and indeed it was essential to the integrity of the Commission's registration process -- for the staff to request a second audit to satisfy itself fully of compliance before registering Lloyd, Carr & Co., a different entity from Lloyd Carr Financial which had submitted the original and an amended application. By virtue only of respondents' refusal to permit access to the firm's books and records, that second audit never took place and compliance with the book- and record-keeping requirements -- and the minimum financial requirements -- was never established.

Second, respondents argue that their continued business activities do not constitute a violation of law because Lloyd Carr Financial is still licensed as a commodity trading advisor, and was so licensed prior to January 17, 1977. Thus, reason respondents, their firms may continue to do business until such time as the Commission acts upon Lloyd, Carr & Co.'s application for registration as a futures commission merchant. Although their position is not articulated in depth, respondents apparently take the view that since arguably they could do business lawfully prior to January 17, 1977, by virtue of Lloyd Carr Financial's registration as a commodity trading advisor and the absence of any Commission registration requirement with respect to the offer and sale of commodity options, Lloyd, Carr & Co., with which Lloyd Carr Financial was apparently

consolidated, may do business lawfully after that date unless and until the Commission formally acts upon and denies the application of Lloyd, Carr & Co.

Respondents necessarily base this argument upon Section 9(b) of the Administrative Procedure Act, 5 U.S.C. §558(c), which provides in pertinent part:

. . . when the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

If all of the criteria set forth in this section have been met, a licensee may continue to do business lawfully pending a determination by the agency on whether a new license or a renewal will be granted, thereby protecting "a person with a license from the damage he would suffer by being compelled to discontinue a business of a continuing nature, only to start it anew after the administrative hearing is concluded." Pan-Atlantic Steamship Corp. v. Atlantic Coast Line Railroad Co., 353 U.S. 436, 439 (1958). In Pan-Atlantic, the Supreme Court articulated the criteria which must be satisfied before one may obtain the protection afforded by this provision of the Administrative Procedure Act:

Section 9(b) of the Administrative Procedure Act is a direction to the various agencies. By its terms there must be a license outstanding; it must cover activities of a continuing nature; there must have been filed a timely and sufficient application to continue the existing operation; and the application for the new or extended license must not have been finally determined.
Id.

We find respondents' reliance on Section 558(c) to be misplaced for a number of reasons. The Commission recognizes that Lloyd Carr Financial was licensed as a commodity trading advisor prior to January 17, 1977. However, the Commission does not accept respondents' claim that two separate and distinct entities, i.e., Lloyd, Carr & Co. and Lloyd Carr Financial, may properly operate as a single entity -- the Lloyd Carr group -- under the aegis of a single Commission registration, commingling their funds with impunity and holding each out to customers and the public without distinction. Lloyd, Carr & Co. and Lloyd Carr Financial are not absolutely interchangeable entities with absolutely interchangeable assets, either for purposes of compliance with the Commission's bookkeeping and financial requirements for those seeking registration as a futures commission merchant or for purposes of utilizing an existing registration of one of them.

The status of Lloyd Carr Financial after the week of January 24, 1977, is unclear from the record. While its assets were apparently transferred to the newly-formed Lloyd, Carr & Co. partnership during that week, no mention is made of the fate of Lloyd Carr Financial. If the transfer of Lloyd Carr Financial's accounts and assets to Lloyd, Carr & Co. signalled the quiescence or dissolution of Lloyd Carr Financial, we fail to see how the past registration of a now dormant or perhaps defunct entity as a commodity trading advisor enables Lloyd, Carr & Co. to avail itself of that registration. Furthermore, even if Lloyd Carr Financial still exists as an ongoing

concern, a Commission registration is not an asset which may be transferred to another entity or under which another entity may do business.^{26/}

More important, however, is that Lloyd Carr Financial's registration as a commodity trading advisor authorized it only to engage in commodity advisory activities; the firm never received a license — continuing or otherwise — to offer or to sell commodity options. Prior to January 17, 1977, this latter activity, in and of itself, did not require registration.^{27/} However, effective January 17, 1977, the Commission prohibited all but persons registered as futures commission merchants or associated persons from engaging in the solicitation and sale of commodity options to the public. Thus, while Lloyd Carr Financial was licensed both before and after January 17, 1977, to render advisory services, on that date the Commission for the first time required registration of those offering and selling commodity options.^{28/}

^{26/} We note that Section 1.15 of the Commission's regulations provides that a new registration is required when a registered partnership changes its name, form of organization or personnel resulting from death, withdrawal or addition of a partner, if the change of personnel, as a matter of law, creates a new partnership. 17 C.F.R. §1.15.

^{27/} In October 1975, the Commission recognized that, in offering or selling commodity options, persons might be engaged in activity that required registration as a commodity trading advisor. 40 Fed. Reg. 49360, 49361 n. 11 (October 22, 1975). See Commodity Futures Trading Commission v. American Options Corp., 120,107 CCH Comm. Fut. L. Rep. 20,785 (C.D. Cal. 1975). Section 1.9 of the Commission's regulations makes explicit that registration as any one type of person, e.g., a commodity trading advisor, does not include registration as any other type of person subject to regulation under the Act. 17 C.F.R. §1.9.

^{28/} When respondents began their business enterprises in mid-1976, they did not enter a totally unregulated field. The Commodity Futures Trading Commission Act of 1974, Pub. L. No.

(footnote continued)

On the other hand, Lloyd, Carr & Co. was never registered with the Commission as a commodity trading advisor or in any other category. And even if we were to assume that Lloyd, Carr & Co. may somehow avail itself of the license of Lloyd Carr Financial as a commodity trading advisor, that license did not and does not entitle it to offer or to sell options.

When viewed in the context of Section 558(c), then, Lloyd, Carr & Co. had no license covering any business activity regulated by the Commission; Lloyd Carr Financial had no license of a continuing nature covering the offer or sale of commodity options; and thus neither

28/ (Footnote continued)

93-463, 88 Stat. 1389 (1974), became law on October 23, 1974, and substantially amended the Commodity Exchange Act. Section 4c(b) of the Act (which became effective on April 21, 1975) made it clear that Congress had committed to the Commission the authority to ban commodity option transactions or to impose terms and conditions upon persons doing business in the field. See footnote 3, *supra*. Thus, everyone entering the commodity option industry after the enactment of Section 4c(b) was on notice of the Commission's authority to regulate their activity. For instance, pursuant to this authority, the Commission acted four days after the effective date of Section 4c(b) and proposed an anti-fraud rule relating to commodity option transactions. 40 Fed. Reg. 18187 (April 25, 1975). That proposal was adopted two months later. 40 Fed. Reg. 25504 (June 24, 1975).

Certainly respondents had no vested property interest in a continuation of the relatively unregulated state of the industry between passage of the 1974 amendments and the promulgation of the Commission's regulations. Similarly, when the interim regulations were adopted and respondents had to register for the first time in order to offer or sell options, they had no rights beyond those afforded by Section 558(c) of the Administrative Procedure Act. Cf. Federal Housing Administration v. The Darlington, Inc., 358 U.S. 84 (1958). Springdale Convalescent Center v. Matthews, 545 F.2d 943 (5th Cir. 1977); Hazelwood Chronic and Convalescent Hospital, Inc. v. Weinberger, 543 F.2d 703 (9th Cir. 1976).

had a license upon which to predicate a continuation of that business. Thus both fail to meet the threshold criteria of Section 558(c).

However, even assuming arguendo that either Lloyd, Carr & Co. or Lloyd Carr Financial was a licensee within the meaning of 5 U.S.C. §558(c), it clearly failed to make timely and sufficient application to the Commission as required by that provision. Lloyd Carr Financial did not resubmit its application for registration with the Commission until January 17, 1977, having known at least since the first contact between LeMieux and the Commission staff in the fall of 1976 that its original application had been returned as incomplete.^{29/} Presumably, that contact came to the attention of respondent Carr during his first conversations with LeMieux over the problems which developed in the application process, and certainly it must have predated Carr's first conversation with a Commission staff member in late November 1976. By Carr's own testimony, he knew as early as mid-December 1976 about the return of Lloyd Carr Financial's application with full

^{29/} While we need not rely upon notice earlier than November or December, when Carr admits having become aware of the return of Lloyd Carr Financial's application, the staff's letter of October 12, 1976, which accompanied the initial application, certainly put respondents on notice of the defects in the original application. Although Carr denies that he ever saw the letter, it is clear beyond doubt that the incomplete application was returned to respondents, since Carr himself was in possession of it in November or December. Given the absence of competent, non-hearsay evidence calling into question actual receipt of the deficiency letter by persons in the employ of respondents other than Carr, the record contains no adequate rebuttal to the copy of the October 12 letter taken from the Commission's files and introduced into evidence. See International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. National Labor Relations Board, 459 F.2d 1329, 1335-1336 (D.C. Cir. 1972).

knowledge that the Commission needed thirty to sixty days to process the application. Yet the application was not resubmitted until ^{30/} January 17, 1977.

Thus, respondents' lack of registration on January 17, the date upon which the sale and solicitation of commodity options by respondents should have ceased, was attributable directly to respondents' own delay and negligence in making proper and complete application to the Commission. The Commission finds on the record before it that because respondents made an untimely and insufficient application for registra-

30/ In announcing adoption of its new options rules, the Commission specifically called to the attention of affected persons the need for them to make prompt and timely application:

The Commission also wishes to stress that as proposed and as adopted, §32.3 of the interim rules provides that on and after January 17, 1977, it will be unlawful for a person to solicit or accept orders for commodity options transactions or for an individual to be associated with any such person, unless registered as a futures commission merchant or as an associated person of such futures commission merchant, respectively, under the Act. Therefore, the Commission again wishes to advise affected persons to file their applications for registration promptly. The Commission is already processing applications for registration which it has received as a result of its announcement of the proposed interim rules. A person who defers filing an application runs the risk that the application may not be processed before the January 17th deadline. Normal requirements for processing are 30-60 days. While the Commission intends to expedite the processing of applications, a prompt filing will enable the Commission to do so on a timely basis. 41 Fed. Reg. 51810 (November 24, 1976).

The Commission was equally explicit at the time the option rules were proposed. 41 Fed. Reg. 44563 (October 8, 1976).

tion as a futures commission merchant, they had no right to continue their business activities on and after January 17, 1977, even if the Commission were to assume that either of the firms were prior licensees within the meaning of 5 U.S.C. §558(c).

The Commission is thus confronted with a situation in which an applicant, whose own dilatory conduct placed in peril its ability to continue its business lawfully, has disregarded the requirements of law in favor of its own self-interest. It was incumbent upon respondents to cease their operations on January 17. They did not. That cessation should have continued pending completion of the processing of the application and of the audit of Lloyd, Carr & Co. It did not. Instead, respondents refused the Commission access to the firm's books and records on January 27 and Lloyd, Carr & Co. continued to do business thereafter while unregistered, in direct and open defiance of the law. Respondents attribute vendetta-like qualities to the Commission staff's response to each stage of respondents' escalating attitude of first delay and then defiance. On the contrary, the staff would have been derelict in its duty had it acted any differently than it did in reviewing the applications submitted or requesting a verifying audit. Respondents' own willful ^{31/} misdeeds and self-interest, which betray themselves in abundance, are the cause of respondents' predicament.

^{31/} See Robert Haltmier v. Commodity Futures Trading Commission, *supra*, 554 F.2d at 562; Silverman v. Commodity Futures Trading Commission, 549 F.2d 28, 31 (7th Cir. 1977); Goodman v. Benson, 286 F.2d 896, 900 (7th Cir. 1961); Lambert Joseph Hagan, *supra*. See pp. 50-51, *infra*.

The Commission finds respondents' continued business activities in the absence of registration to be intolerable. Respondents have pursued their own interests in flagrant disregard of the law. In the Commission's view, this arrogance of action and scofflaw attitude of compliance when convenient are incompatible with fitness for registration as a futures commission merchant and, without more, justify denial of Lloyd, Carr & Co.'s pending application and the other sanctions which the Commission has determined to impose, even if the Commission were to assume that the firm's financial condition and books and records were at the time of the hearing -- and at the moment are -- in full compliance with the Commission's requirements.

- B. Respondents unlawfully permitted their salespersons to continue to solicit and to accept commodity options orders after January 17, 1977.

The very same course of conduct operates against respondents with regard to their actions in permitting individuals associated with a firm that was required to be registered as a futures commission merchant to continue soliciting and accepting orders for commodity options while those individuals were not registered with the Commission. Here, respondents did not even attempt to comply with the regulations prior to January 17. Applications on behalf of Lloyd Carr & Co.'s employees were not received by the Commission until January 20, 1977, three days after the registration deadline. While Carr understood the prohibition against continued solicitation

by unregistered individuals, he determined to permit them to continue their activity. The fact that Carr, as he once asserted, may have been under a misapprehension that the employees were applying for registration in a more timely manner protects neither him nor his firm from liability. Cf. United States v. Park, 421 U.S. 658, 670-672 (1975); United States v. Dotterweich, 320 U.S. 277 (1943).

It was respondents' duty to adopt measures to assure compliance with the registration requirements in the first place, but failing that, to forbid unregistered persons to continue their sales activities on and after January 17, 1977. Regardless of whether the actual registration process took thirty-six days or forty-eight days once commenced,^{32/} respondents lose sight of the fact that their sales personnel never stopped their sales activities. Thus, it makes no difference whether or not the applications of persons associated with the firm were unduly delayed beginning on the thirty-seventh day, or at all — respondents were in blatant violation of Section 4c(b) of the Act and Section 32.3 of the regulations on and after January 17, 1977.

C. Respondents unlawfully refused to permit authorized Commission personnel access to the books and records of Lloyd, Carr & Co.

We need say little about respondents' refusal to permit the second audit of Lloyd, Carr & Co.'s books and records. Once again, respondents assumed a posture of being above the law. The

^{32/} Respondents argue that the applications submitted on behalf of their associated persons took longer to process than applications submitted on behalf of salesmen of other option dealers, i.e., forty-eight days on the average for Lloyd, Carr & Co.'s salesmen versus thirty-six days for others.

Commission's regulations are clear. They require persons seeking registration or those already registered with the Commission as futures commission merchants, to permit Commission personnel to inspect their books and records. Sections 1.18, 1.31 and 32.7 of the Commission's Regulations, 17 C.F.R. §§1.18, 1.31 and 32.7 (1977). The courts have consistently upheld regulations of this type by agencies such as the Commission that regulate business activity. American International Trading Company v. Bagley, 536 F.2d 1196, 1198 (7th Cir. 1976). See also, United States v. Morton Salt Co., 338 U.S. 632, 642-643 (1950); Securities and Exchange Commission v. Howatt, 525 F.2d 226 (1st Cir. 1975); Securities and Exchange Commission v. Brigadoon Scotch Distributing Co., 480 F.2d 1047 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974); Bartlett Frazier Co. v Hyde, 65 F.2d 350 (7th Cir. 1933).^{33/}

The parties agree that, at the very least, respondents refused to permit Division of Enforcement personnel to participate in the audit requested by the staff on January 26, 1977. According to the testimony of Carr, counsel for respondents informed a member of the Commission's audit staff that, while it would be acceptable for the Commission's auditors to return for an audit of Lloyd, Carr &

^{33/} On May 11, 1977, respondents filed a memorandum citing an order dated April 26, 1977, in Commodity Futures Trading Commission v. Rosenthal, No. 76 C 3904 (N.D. Ill.), as contrary authority (Record Document No. 50). However, the court's decision in that case not to permit inspection of a firm's books or records was based upon the court's prerogative to control discovery during an ongoing judicial proceeding, and does not purport to curtail the Commission's investigatory powers generally.

Co.'s books and records, respondents would not permit Division of Enforcement personnel to participate. The staff member's testimony on this point did not differentiate between the audit staff and Division of Enforcement personnel. He recalled only that respondents informed him that there would be no audit until Lloyd, Carr & Co. had been registered by the Commission. Regardless of whether respondents refused access to Division of Enforcement personnel or to all Commission employees, they have violated the Commission's regulations. There is no basis in law for the necessary implication of respondents' argument that they, not the Commission, determine which members of the Commission staff may inspect or audit their books. We agree with the Administrative Law Judge that this attempt to limit inspection by Commission personnel according to respondents' own self-determined standards evidences a "degree of audacity . . . perhaps unsurpassed in this newly-regulated industry" (Recommended Decision at 21).

Respondents attempt to justify their refusal to permit the second inspection on the grounds that the Division of Enforcement had no legitimate involvement in the pre-registration audit absent some proffered suspicion of violation of the Act, and therefore were participating for some ulterior motive. They argue that they properly could limit Commission access to their books and records because no legitimate audit purposes would be served by an examination. Respondents conjecture, without any substantial showing, that the

Division of Enforcement personnel harbored an "ulterior motive" in wishing to participate in the second audit.^{34/}

However, Judge Painter exposed the true barrenness of respondents' averments. In an attempt to satisfy what he regarded at the outset to be a sincere distrust of the Division of Enforcement by respondents, and to provide a means by which the current state of Lloyd, Carr & Co.'s books and records might be introduced into the record, Judge Painter suggested after the close of the hearing that if respondents would permit an independent auditor selected from a list supplied by respondents to perform an audit with the only guidance provided by the Commission's regulations, he would re-open the record to allow the results of such an examination to be placed into evidence. Respondents refused this offer. This led Judge Painter to conclude that respondents' decision "lays to rest any argument that respondents refusal was predicated upon a fear of persecution by this agency" (Recommended Decision at 29). We concur with the adverse inference drawn by the Administrative Law Judge.^{35/}

^{34/} The main objection put forward by respondents to participation of Division of Enforcement personnel in any audit was their concern that the Division would, on the basis of information garnered during the audit, contact respondents' customers to speak to them about respondents' business practices. Even if this were the case, the Seventh Circuit has upheld that very practice. American International Trading Company v. Bagley, *supra*, 536 F.2d at 1198. Thus, this does not constitute a basis on which to deny the Division's personnel access to the books and records.

^{35/} See footnote 29, *supra*. Even though it was not necessary for the Commission staff to justify the legitimacy of the audit request, we note that a member of the staff testified that,

(footnote continued)

The Commission has an unqualified right to select any of its employees to inspect the books and records of an applicant or registrant to determine compliance with the law. Since respondents refused access to authorized representatives of the Commission, they were in violation of Section 4c(b) of the Act and Sections 1.18, 1.31 and 32.7 of the Commission's regulations.

D. Respondents failed to prepare and to keep current books and records as required by Sections 1.18 and 32.7 of the Commission's regulations.

Respondents contend that Sections 1.18 and 32.7 of the Commission's regulations do not require that applicants prepare and maintain specific books and records, but rather leave the exact nature of the documents to the discretion of the individual applicant. In respondents' view, so long as the records of an applicant satisfy the regulatory purpose, the absence of any specific type of record cannot be deemed a deficiency under the regulation sufficient to deny registration. Even if we were to adopt this point of view, the applicant's books and records did not satisfy the regulatory

35/ (Footnote continued)

in his view, a second audit was absolutely necessary in view of the confused state of the books and respondents' partnership organization at the time of the first audit. He stated that the first audit was simply inadequate to determine whether the books and records satisfied either the record-keeping requirement of Section 1.18 of the Commission's regulations or the minimum capital requirements of Section 1.17(b).

^{36/} purpose. The regulations require that an applicant's or registrant's books and records provide an accurate foundation for and reflection of the entries made upon Commission Form 1-FR, which must be submitted with all applications for registration as a futures commission merchant. Only in this way can the Commission be certain that an applicant satisfies the minimum financial requirements imposed by Section 1.17 of the Commission's options regulations, 17 C.F.R. §1.17 (1977).^{37/} This applicant's books and records did not satisfy the thrust of these regulations.

Contrary to respondents' assertions that the books and records did in fact satisfy the spirit of the book- and record-keeping requirements, if not their letter, the record reflects that the books and records were not complete. Among other things, respondents failed to maintain a customer ledger; records supporting liability, income and expense accounts; trial balances; and other receipt and disbursement journals or ledgers. Moreover, we are not satisfied that the books and records, as viewed on January 20 and 21, 1977, accurately reflected the relative relationship, interrelationship, and identity of the entities and their principals constituting

^{36/} At the outset, we note that the relevant period for scrutiny of the condition of the firms' books and records is from January 20 and 21 through January 26, 1977, the date on which respondents refused access to the Commission for the purpose of a second audit.

^{37/} See footnote 19. The book- and record-keeping and inspection provisions imposed by the Commission provide the window into an applicant's or registrant's affairs through which the Commission may monitor compliance with its more substantive provisions, such as minimum capital requirements.

the respondent "group" and the assets thereof. Given respondents' subsequent refusal to permit the inspection of Lloyd, Carr & Co.'s books and records, the Commission has no probative evidence before it establishing compliance with the Act or the regulations.

In addition, respondents argue that they were not put on notice as to the exact nature of the books and records that are required by the Commission. The Commission disagrees. The language of Sections 1.18 and 32.7 is specific and unambiguous both as to the purpose of the regulations and the means of satisfying them. The regulatory language is nothing more than a compilation of terms of art with which any accountant or bookkeeper with some experience in the brokerage industry would be conversant.

Last, respondents argue that since no deficiency letter has ever been provided to them setting forth with particularity the shortcomings of the books and records, they must have passed muster with the original auditors and their supervisors. Respondents argue that, absent a deficiency letter and an opportunity to remedy the defects noted therein, their rights under the Administrative Procedure Act have been violated. See 5 U.S.C. §558(c).^{38/} However,

^{38/} 5 U.S.C. §558(c) provides in pertinent part:

Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given --

(footnote continued)

this argument overlooks the fact that the written notice provision contained in Section 558(c)(1)-(2) applies only in cases in which the object of the agency proceeding is to withdraw, suspend, revoke or annul an existing license.^{39/} Here, neither applicant has a license as a futures commission merchant, but, rather, were in the process of applying for one.^{40/}

Though we would normally be reluctant to accept the argument advanced by the Division of Enforcement that, even if the written notice

38/ (Footnote continued)

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

39/ Moreover, it is clear beyond question that respondents were informed orally of the deficiencies found in Lloyd, Carr & Co.'s books and records and its partnership structure. It was respondents who were anxious to expedite the application process and who sought to urge the Commission staff to speedier action by use of the telephone and use of couriers, as opposed to communication by mail. In that context, the Commission staff, in attempting to defer to respondents' desire, cannot be faulted for not providing written notice prior to issuance of the administrative complaint, especially since respondents have been able to articulate no prejudice flowing to their detriment as a result of the communications between respondents and the Commission staff having been oral rather than in writing. See Shuck v. Securities and Exchange Commission, 264 F.2d 358, 360, 361 (D.C. Cir. 1958).

40/ See George Steinberg and Son, Inc. v. Butz, 491 F.2d 988, 993-994 (2d Cir. 1974), cert. denied, 419 U.S. 830 (1974); Hamlin Testing Laboratories, Inc. v. Atomic Energy Commission, 357 F.2d 632, 638 (6th Cir. 1966).

provision of Section 558(c) applies, respondents' non-compliance with the Commission's book- and record-keeping requirements was so grossly negligent that it was willful and hence, excepted from the written notice requirement of that statute, the balance is tipped in the direction of the Division by the inference drawn by the Administrative Law Judge from respondents' refusal to permit an audit by an independent auditor. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. National Labor Relations Board, supra, 459 F.2d at 1335-1336. While we do not go so far as to find the aura of fraud discerned by the Administrative Law Judge (Recommended Decision at 30), respondents' conduct certainly casts a long shadow over their intent to comply with the book- and record-keeping requirements, even as late as March 23, 1977. From such reluctance, a finding of willfulness is but a short step and one which we take. See Silverman v. Commodity Futures Trading Commission, supra, 549 F.2d at 31.

E. The procedural decisions of the Commission and the Administrative Law Judge did not deprive respondents of due process of law.

In their pleadings, respondents have tendered a lengthy list of what they consider to be material substantive and procedural defects in the proceedings against them. We have considered each of these contentions and have determined that they lack merit and are for the most part frivolous.^{41/} However, we wish to address respondents' arguments

^{41/} This list challenged a multitude of procedural and evidentiary decisions made by Judge Painter during the course of the hearing

(footnote continued)

relating to the Commission's Order of expedited procedures in this proceeding and to the termination of the hearing by Judge Painter on March 23.

In support of the argument that the adoption of expedited procedures by the Commission was improper, respondents argue simply that there was no factual or legal basis for the Commission's decision. Rule 10.3 of the Commission's Rules of Practice, 17 C.F.R. §10.3, permits the Commission to waive any of its Rules of Practice and to adopt expedited procedures "upon a determination that no party will be prejudiced and that the ends of justice will be served," thereby insuring a sufficient degree of flexibility in the adjudicatory process.^{42/} In the Commission's view, the findings we made at the time we ordered the expedited proceedings, inter alia, that since respondents are charged with soliciting and accepting orders and monies for commodity options

^{41/} (Footnote continued)

and included such matters as scope of questioning and cross-examination, the relevancy of questions and evidence, and the propriety of conduct of the Division of Enforcement personnel. Respondents also questioned the propriety of the mid-hearing order of Judge Painter directing respondents to permit Commission audit personnel to conduct an examination of respondents' books and records and the failure of Judge Painter to force disclosure by the Division of "exculpatory" evidence. We have considered each of these arguments; each either lacks legal or factual basis or relevance, and none has any substantive merit that the Commission believes requires discussion.

^{42/} See Gulf States Utilities Co. v. Federal Power Commission, 411 U.S. 747, 762-763 (1973); Consumer Federation of America v. Federal Power Commission, 515 F.2d 347, 354-355 n.45 (D.C. Cir., 1975); Marine Space Enclosures, Inc. v. Federal Maritime Commission, 420 F.2d 577, 589 (D.C. Cir., 1969).

after January 17 while not being registered with the Commission, the public is entitled to protection at the earliest possible moment if respondents' application for registration is to be refused, adequately support our decision. Moreover, respondents have not alleged any inability to prepare their defenses adequately as a result of the expedited procedures.^{43/}

Respondents also attack the Administrative Law Judge's decision to terminate the administrative hearing on March 23. They argue that Judge Painter's decision prevented them from complying with the Division of Enforcement's subpoena for respondents' books and records, which was served on the offices of respondents' counsel on March 3, 1977 (Division Exhibit 16), prevented the testimony of a number of witnesses crucial to respondents' defense (including

^{43/} Respondents also complained that the Commission's modification of its original expediting Order at the conclusion of the hearing to provide for a recommended decision by the Administrative Law Judge, in addition to showing bias by the Chairman and Vice-Chairman (see note 8 above), constitutes an error of law because of the procedures used to accomplish it. Respondents offer no legal support for this argument; they proffer only an allegation of prejudice, i.e., that they were unable to respond to the Division's motion, which precipitated the modification, because of the swiftness of Commission action. Pursuant to Section 10.26 of the Commission's Rules of Practice, 17 C.F.R. §10.26 (1977), the Commission may act upon a procedural motion at any time without awaiting a response. Any party adversely affected thereby may request reconsideration, vacation or modification of the order after the fact. However, respondents have never made any such requests. Even if an opposition were filed and considered by the Commission at this time, it is not readily apparent how the March 23 decision to require Judge Painter to file a recommended decision acted to respondents' prejudice, especially since it only extended to respondents a procedural right contemplated by the Administrative Procedure Act, 5 U.S.C. §557.

additional testimony by respondent Carr and testimony by respondents' accountant on the condition of Lloyd, Carr & Co.'s books and records), and deprived respondents of an opportunity to make any showing about the propriety of the sanctions sought in the complaint.

The standard against which the Judge's decision must be gauged is whether or not he abused his discretion^{44/} in the manner in which he regulated the course of the hearing.^{45/} It matters not whether the Commission itself might have reopened the hearing upon the arrival of respondents' witnesses. Rulings such as the one now challenged by respondents are committed to the discretion of the Administrative Law Judge and it is not our duty to second guess such judgmental decisions absent a finding of a clear error of judgment. On review of the record, we find that Judge Painter did not abuse his discretion, given the prior conduct of respondents' case during the course of the hearing and the fact that the proceeding was to be conducted on an expedited basis in accordance with the Commission's Order.

Judge Painter found that "[s]trenuous efforts were made [by respondents] to have this proceeding stayed or abated, and in

^{44/} See, e.g., National Labor Relations Board v. Donkin's Inn, Inc., 532 F.2d 138, 140 (9th Cir. 1976); National Labor Relations Board v. Air Control Products of St. Petersburg, Inc., 335 F.2d 245, 247 (5th Cir. 1964); National Labor Relations Board v. Algonna Plywood and Veneer Co., 121 F.2d 602, 604-605 (7th Cir. 1941).

^{45/} The failure of respondents' witnesses to appear on a timely basis on March 23 caused counsel to seek what in effect was a short recess or continuance until the witnesses arrived. A party seeking to show prejudice as a result of the denial of a request for continuance must demonstrate that due diligence has been exercised in attempting to obtain the attendance of the witness at the appropriate time. United States v. Miller, 513 F.2d 791, 793 (5th Cir. 1975). See also 5 U.S.C. §556(c).

the alternative to convert the hearing into a trial of the Commission and its regulations" (Recommended Decision at 15). The Judge based that conclusion on the late arrival of counsel and witnesses of respondents and their failure to permit inspection of Lloyd, Carr & Co.'s books and records while the hearing was in progress. Judge Painter discussed the absence of respondent LeMieux from the hearing, which forced an early conclusion to the Division's case since LeMieux had been called as a Division witness; the considerable latitude given to counsel for respondents by the Judge; the dislocation to the court's schedule caused by respondents and their witnesses; and finally, the tardiness of respondents' witnesses that precipitated the closing of the hearing.^{46/} In the words of Judge Painter:

Respondents' counsel objected vigorously to opening the hearing at 8:30 a.m. on March 23, asserting that it would be an imposition on the witnesses to travel to Washington the night before the hearing. ^{47/} After all, he argued, the witnesses were family men. No such solicitous concern had been expressed by respondents' counsel for similar impositions placed on others involved in this hearing. . . . At 8:30 a.m. counsel for respondents' appeared on time, but without any witnesses. He immediately went into an explanation of weather conditions in New York and the like. The failure of respondents' counsel to have witnesses available pursuant to the explicit and unambiguous orders of the presiding official the preceding day represents either a callous indifference to the hearing process, or a deliberate and calculated effort to make it appear that respondents were being denied an opportunity to participate fully and fairly in this hearing

^{46/} Based on our review of the record, we adopt these findings as stated by Judge Painter.

^{47/} Respondents' failure to comply with Judge Painter's order to have their witnesses present at 8:30 A.M. on March 23, violated specific instructions and warnings given respondents by Judge

(footnote continued)

that they did not want. The record must speak for itself. At 8:33 a.m. on March 23, 1977, the hearing was closed (Recommended Decision at 17-18) (footnotes added). ^{48/}

As we have noted, the decision of Judge Painter to terminate the hearing when and as he did must be analyzed against the standard of abuse of discretion.^{49/} When viewed in context, regardless of whether other courses of action might also have been reasonable, we are not constrained to conclude that Judge Painter abused his discretion and, thus, his decision to close the hearing on March 23 must be upheld.^{50/}

^{47/} (Footnote continued)

Painter at the close of proceedings on March 22, 1977. The Judge informed counsel for respondents on the occasion of recessing the proceedings prematurely on March 22 due to the failure of respondents to have their witnesses available and ready to proceed, that he would not tolerate such a state of affairs the following morning. He admonished counsel to have his witnesses travel to Washington that evening so that their availability on the following morning would be a certainty. Respondents failed to heed Judge Painter's suggestions, and thus were not prepared to go forward at 8:30 A.M. on March 23.

^{48/} The Administrative Law Judge states at one point in his decision that he terminated the hearing at 8:32 a.m.; at another he sets his action at 8:33 a.m. The second reference appears to be in error; the 8:32 a.m. time is corroborated by the transcript and the pleadings submitted by the parties.

^{49/} See footnote 44, supra.

^{50/} Additionally, we discern in the record no material prejudice attaching as a result of the early termination. First, while perhaps relevant to the issue of mitigation, the condition of respondents' books and records after initiation of this proceeding, which respondents proffer that they had intended to show, but for the hearing having been closed, is irrelevant to their willful and deliberate violations of the Act and the Commission's regulations. It is the condition of the books and records at the time the

(footnote continued)

III. SANCTIONS

Section 8a(2)(B) of the Act authorizes the Commission to refuse to register any person found, after opportunity for hearing, to be

unfit to engage in the business for which the application for registration is made, (i) because such applicant, or, if the applicant is a partnership, any general partner, . . . at any time engaged in any practice of the character prohibited by this Act . . . or (ii) for other good cause shown

As we have already stated, Section 4c(b) of the Act expressly prohibits any person from offering to enter into, entering into or confirming the execution of, a commodity option transaction "contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe" Pursuant to Section 4c(b), the Commission has adopted an interim regulatory scheme prescribing the terms and conditions under which persons may engage in commodity option transactions. Key elements of this regula-

50/ (Footnote continued)

Commission first examined them that the Commission considers to be crucial to its decision to find that respondents committed the book- and record-keeping violations charged in the complaint. While the condition after that time might have been relevant as a matter in mitigation, as Judge Painter pointed out, it would be mitigating only as to those violations and would not cause the Commission to temper its decision to impose sanctions for respondents' deliberate violations of the Act, e.g., continuing to solicit orders for commodity options after January 17, 1971, and refusing to permit a second audit of the books and records. As for the testimony of respondent Carr, no proffer was made as to how Carr intended to supplement materially his already extensive testimony. Neither was a proffer made as to the expected testimony of respondents' accountant. Absent some meaningful tender by respondents, the Commission is simply unable to judge that the importance of the expected testimony counterbalances the concern of Judge Painter.

tory structure are the futures commission merchant and associated person registration requirements of Section 32.3 of the Commission's rules. In addition, Sections 1.18 and 32.7 of the Commission's regulations impose a number of book- and record-keeping requirements upon persons seeking registration as a futures commission merchant, as a condition of lawfully engaging in the business of soliciting or accepting orders for commodity options. Sections 1.31 and 32.7(e) also require the production of such books and records to any authorized representative of the Commission or the United States Department of Justice.

A violation of any of the foregoing rules or regulations is a violation of the terms and conditions prescribed by the Commission allowing persons to engage in commodity option transactions with the public pursuant to Section 4c(b) of the Act. Thus, activity that violates any of these regulations constitutes a violation of an express statutory prohibition and thus is a "practice of the character prohibited by this Act" within the meaning of Section 8a(2)(B)(i). If evidence is introduced and establishes a violation of any of such regulations by an applicant, or a general partner of an applicant which is a partnership,^{51/} a prima facie case has been made, and if

^{51/} In this connection we note that the acts or omissions of Carr or LeMieux, acting on behalf of either of the partnerships within the scope of his employment or office, are deemed to be the acts or omissions of the partnership as well as of Carr or LeMieux. See Section 2(a)(1) of the Act, 7 U.S.C. §2; Nichols & Co. v. Secretary of Agriculture, 131 F.2d 651, 658 (1st Cir. 1942), modified on other grounds, 136 F.2d 503 (1st Cir. 1943). See also Carras v. Burns, 516 F.2d 251, 259 (1975); Securities and Exchange Commission v. Management Dynamics, Inc., 515 F.2d 801, 812-813 (2d Cir. 1975); Johns Hopkins University v. Hutton, 422 F.2d 1124, 1130 (4th Cir. 1970).

the applicant is then unable to make a showing satisfactory to the Commission either refuting the evidence of violation, or in mitigation, the Commission may deny its application for registration as a futures commission merchant. Savage v. Commodity Futures Trading Commission, 548 F.2d 192, 196 (7th Cir. 1977); Lambert Joseph Hagan, ¶20,171 Comm. Fut. L. Rep. 21014 (1976).

The same regulatory violations also constitute a basis upon which the Commission may act, pursuant to Section 8a(3) of the Act, "to suspend or revoke the registration of any person registered under this Act if cause exists under [Section 8a(2)(B)] which would warrant a refusal of registration of such person" Thus, if either general partner of Lloyd Carr Financial is found to have engaged in a practice of the character prohibited by the Act, even if he has engaged in activities on behalf of Lloyd, Carr & Co., Lloyd Carr Financial's registration as a commodity trading advisor may be revoked.

Pursuant to Section 6(b) of the Act, the Commission may impose a number of other sanctions upon finding that a person "has violated any of the provisions of this Act or of the rules, regulations, or orders of the Commission thereunder" These sanctions include a prohibition against trading on or subject to the rules of any contract market, suspension or revocation of the registration of any person registered under the Act, and assessment of a civil money penalty of not more than \$100,000 for each violation. Also, if the

Commission finds a person to have violated any of the provisions of the Act or the rules, regulations or orders of the Commission, it may, pursuant to Section 6(c) of the Act, enter an order directing that such person shall cease and desist from such violations. Thus, when confronted with violations of the Act or regulations, the Commission may impose a variety of statutory sanctions in the exercise of its discretion in selecting the means of achieving its policy objectives after consideration of all pertinent factors. Savage v. Commodity Futures Trading Commission, supra, 548 F.2d at 197, n. 8; Haltmier v. Commodity Futures Trading Commission, supra, 554 F.2d at 563-564.^{52/}

On considering the record as a whole, both evidence on the merits of the violations charged and evidence in mitigation, the Commission finds by the weight of the evidence that Lloyd, Carr & Co., willfully aided and abetted by acts and omissions of its

^{52/} Cf. American Power & Light Co. v. Securities and Exchange Commission, 329 U.S. 90, 112-113 (1946); Securities and Exchange Commission v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 187-188 (1963); Quinn & Co. v. Securities and Exchange Commission, 452 F.2d 943, 947 (10th Cir. 1971), cert. denied, 406 U.S. 957 (1972); Sinclair v. Securities and Exchange Commission, 444 F.2d 399, 402 (2d Cir. 1971); O'Leary v. Securities and Exchange Commission, 424 F.2d 908 (D.C. Cir. 1970); Armstrong, Jones & Co. v. Securities and Exchange Commission, 421 F.2d 359, 364-365 (6th Cir. 1970), cert. denied, 398 U.S. 958 (1970); Nees v. Securities and Exchange Commission, 414 F.2d 211, 217 (9th Cir. 1969); Lawrence v. Securities and Exchange Commission, 398 F.2d 276, 280 (1st Cir. 1968); Marketlines, Inc. v. Securities and Exchange Commission, 384 F.2d 264, 267 (2d Cir. 1967), cert. denied, 390 U.S. 947 (1968); Tager v. Securities and Exchange Commission, 344 F.2d 5, 8-9 (2d Cir. 1965).

general partners Carr and LeMieux, has violated the Act as charged. Moreover, a number of decisions to violate the Commission's regulations were intentionally and deliberately made by Carr and LeMieux, as general partners of Lloyd, Carr & Co. While these acts may have been undertaken in the name of Lloyd, Carr & Co., the individuals making those decisions willfully aided and abetted in those violations and therefore we hold Carr and LeMieux to be in violation of the Act as principals, i.e., in the same manner as the partnership. Section 13(a) of the Act, 7 U.S.C. §13c(a) (Supp. V, 1975).

On the basis of the violations by Lloyd, Carr & Co., we have determined to deny its application for registration as a futures commission merchant. Since by the terms of Section 8a(2) of the Act, as incorporated into Section 8a(3) of the Act, a person's registration may be revoked if the Commission finds that any general partner has engaged in a practice of the character prohibited by the Act, and since we have found violations of the Act by Carr and LeMieux, Lloyd Carr Financial's general partners, the Commission has also determined to revoke Lloyd Carr Financial's commodity trading advisor registration.^{53/} In addition, we shall order all respondents to cease and desist from their violations of the Act and the Commission's regulations.

^{53/} Because of the close, indeed, inbred, relationship between Lloyd, Carr & Co. and Lloyd Carr Financial, the apparent free transfer of assets between the two, their common ownership, and the fact that respondents' initial illegal continuation in business on January 17 was partially undertaken in the name of

(footnote continued)

As we reviewed in detail above, Carr freely admitted and the evidence amply demonstrates that he and LeMieux made a calculated, intentional decision to defy the Commission's options rules and to permit Lloyd, Carr & Co. to continue to engage in, and to permit a number of its salespersons to engage in, the solicitation and sale of options after January 17, 1977, without being registered. Respondents also made a considered decision to refuse the Commission's staff access to Lloyd, Carr & Co.'s books and records on January 26, 1977. A violation is willful if the violator "1) intentionally does an act which is prohibited,--irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirements" Goodman v. Benson, supra, 286 F.2d at 900. While the Commission need not find willfulness on the part of Lloyd, Carr & Co. in order to establish that the violations charged have been committed, the fact that its violations were willful and, indeed, deliberate, justifies the imposition of stringent sanctions. See Shuck v. Securities and Exchange Commission, supra, 264 F.2d at 362-363; George Rex Andrews, 32 A.D. 553 (1973). Indeed, Carr's and LeMieux's conduct went far beyond the threshold of willfulness required by Section 13a of the Act, set forth in Goodman v. Benson,

53/ (Footnote continued)

Lloyd Carr Financial, the formal distinction between the two entities cannot be a bar to truly effective remedial action. In re Louis Romoff, 31 A.D. 158, 187-200 (1972); Cf. Nichols & Co. v. Secretary of Agriculture, supra, 131 F.2d at 658. See also Quinn v. Butz, 510 F.2d 743 (D.C. Cir. 1975); Eastern Produce Co. v. Benson, 278 F.2d 606, 610 (3rd Cir. 1960).

supra, and adopted in Haltmier v. Commodity Futures Trading Commission, supra. Carr and LeMieux not only intentionally committed the acts and caused their firms to commit the acts prohibited by the Commission's regulations and the Act, but did so after a calculated decision with full knowledge of those prohibitions.

We base our decision to impose these sanctions only upon these intentional and deliberate violations, i.e., respondents' continuation of business activities after January 17, 1977, without registration of Lloyd, Carr & Co. as a futures commission merchant and without registration of many of its salespersons as associated persons, and respondents' refusal to permit a second audit of its books and records by the Commission's staff. Any single one of these deliberate violations justifies the imposition of the sanctions we have determined to impose. However, we do not base the imposition of any sanction upon the violations we find relating to the condition of respondents' books and records, since those violations were not, at least at the outset, the result of deliberate decisions calculated to defy the Commission's authority.

Respondents place great weight upon claims of legal right which, in the Commission's view, are simply unpersuasive. They place no great reliance upon factual defenses to the intentional violations upon which we rely. While respondents also claim that they would have introduced evidence in mitigation had the hearing not been concluded prematurely, they have made no proffer of the substance of such

evidence beyond noting that they had intended to introduce evidence related to the current status of their books and records, perhaps even the records themselves. However, respondents' refusal to permit an independent post-hearing audit as proposed by the Administrative Law Judge undercuts the credibility of respondents' proffer and their claim that they had refused access to the books and records previously only because they feared participation by the Division of Enforcement.

Respondents incorporate by reference in their Exceptions to the Recommended Decision paragraphs 57-64 from their proposed findings of fact as matters in mitigation. In those paragraphs, respondents extoll their fair dealing and salesperson training program. However, even assuming such averments to be true, they do not lead us to a different result. The complaint did not question respondents' fair dealing or training program. While we place high value on such factors in certain circumstances, in this case they do not redeem respondents' calculated disregard of the law; they do not relate to respondents' deliberate violations of the Act, which the Commission considers to be critical to its decision to impose sanctions; nor do they evidence any rehabilitation of respondents which would lead us to a different conclusion. Thus we do not accept respondents' arguments in mitigation as proper justification for declining to impose any sanctions. See Savage v. Commodity Futures Trading Commission, supra, 54/ 548 F.2d at 196-197.

54/ We also note that, as respondent Carr candidly confessed, he was familiar with the need to follow government regulations and with the substance of the Commission's newly imposed options regulations. Thus, he may not shield himself or the other respondents by any mitigating claim of inexperience or lack of knowledge.

In treating a situation in which respondents have exhibited undisguised disdain for the Commission's lawful authority, one principle is certain: the Commission cannot -- and will not -- permit persons deliberately to flout the law with impunity. The Commission has received a mandate from Congress to establish order in and control over an industry unused to the feel of stringent government regulation. In this context, and at this stage of its existence, the Commission must make its expectations known to all and to assert its authority when called for, lest it invite defiance from those subject to its regulations. We need not tarry long over the relationship between the violations and the sanctions imposed. Denial of Lloyd, Carr & Co.'s application for registration and revocation of Lloyd Carr Financial's commodity trading advisor registration meet the offense and certainly should deter others from following in respondents' footsteps. Eastern Produce Co. v. Benson, supra, 278 F.2d at 610. Nichols & Co. v. Secretary of Agriculture, supra, 131 F.2d at 659. Suffice it to say that the Commission will not risk that the public at large will be exposed to commodity professionals who conduct business with callous disregard for the law. The highest ethical standards must prevail in every facet of the commodity options industry. Commodity Futures Trading Commission v. J.S. Love & Associates Options, Ltd., 422 F. Supp. 652, 659 (S.D.N.Y. 1976). S. Rep. No. 93-1131, 93d Cong., 2d. Sess. 14-15, 21 (1974); H. Rep. No. 93-975, 93d Cong., 2d Sess. 35 (1974).

To assure that respondents, both partnerships and individuals, do not continue to conduct their business in defiance of the Act and the Commission's regulations, an Order directing respondents to cease and desist from the violations charged is particularly appropriate in this case since we have no reason to believe that respondents will heed the Act and our regulations any more in the future than they have in the past.^{55/} This will place respondents in jeopardy of stringent civil penalties, which we will not hesitate to impose should that Order be violated, as well as of criminal prosecution.

However, we have determined not to impose the civil money penalties suggested by Judge Painter. To some extent, our decision in this regard is prompted by the absence of an adequate inquiry into respondents' financial affairs as required by Section 6(d) of the Act, 7 U.S.C. §9a (Supp. V, 1975). Section 6(d) requires the Commission to consider, before assessing a civil money penalty, both the gravity of the offense and either the size of a respondent's business and its ability to continue therein or the respondent's net worth. Since it is not clear in the record that these factors were formally addressed, the Commission may not make the judgments which Section 6(d) requires without remanding the case for further inquiry on that

^{55/} See Savage v. Commodity Futures Trading Commission, *supra*, 548 F.2d at 196-197. We include the individual respondents within the purview of this cease and desist order, as well as the partnerships. Carr and LeMieux embody the two partnership respondents and willfully aided and abetted in the critical decision to permit the firms and their employees to continue soliciting and accepting orders for commodity options after January 17, 1977.

issue unless the Commission itself were to undertake that inquiry. While either of those courses of action might be desirable in other circumstances, in our view the separation of this single issue from the remainder of this case is not necessary. We believe that the sanctions we have imposed are adequate to cure the ills we have found.^{56/} This is not a case, for example, where respondents have been found to have committed fraud, manipulation or breach of fiduciary responsibility.^{57/} Such cases would certainly be more deserving of the

^{56/} We also take note of the fact that respondents may not entirely escape financial loss from the action the Commission takes today. A contract between a party doing business in a regulated industry without holding the required license and another party who has no knowledge of the former's unregistered status may be voidable in the discretion of the latter party. See Westerlund v. Black Bear Mining Co., 203 F.2d 599, 611-613 (8th Cir. 1913). Since doing business without being registered also constitutes a violation of the Act and the Commission's regulations, as we have discussed, the Commission's reparations procedure may be available for aggrieved customers, see Section 14 of the Act, 7 U.S.C. §18 (Supp. V, 1975), or a party may resort to a private right of action. See Booth v. Peavey Company Commodity Services, 430 F.2d 132,133 (8th Cir. 1970), Johnson v. Espey, 341 F. Supp. 764, 766 (S.D.N.Y. 1972); Anderson v. Francis I. du Pont & Co., 291 F. Supp. 705, 710 (D. Minn. 1968); Hecht v. Harris, Upham & Co., 283 F. Supp. 417, 437 (N.D. Cal. 1968) modified as to damages, 430 F.2d 1202 (9th Cir. 1970); Goodman v. Hertz, 265 F. Supp. 440, 447 (N.D. Ill. 1967).

^{57/} Of course, the Commission is concerned about the lot of respondents' customers, given our action today. Thus, we wish to make clear that the Commission's Opinion and Order do not preclude respondents from meeting their commitments on all open positions which were established on behalf of respondents' customers prior to the date of this Opinion and Order. On the contrary, respondents have a fiduciary obligation to fulfill the commitments that they have to customers or to assure that some other person registered as a futures commission merchant will do so. The Commission would consider a default by respondents in this regard to be an actionable breach of their fiduciary responsibility and a violation of Section 32.9 of its regulations, the Commission's anti-fraud rule governing commodity option transactions, 17 C.F.R. §32.9 (1977).

sanction of a civil money penalty. This is not to downplay the gravity of respondents' offenses; it is only to say that by denying and revoking Commission registration of the firms and ordering respondents to cease and desist upon pain of further Commission action or criminal prosecution, stern yet responsive sanctions will have been meted out -- which in the Commission's view fit the offenses which have been committed.

The Commission declines to revoke LeMieux's registration as an associated person only because that sanction was not sought in the complaint while other specific remedies were enumerated, and therefore, LeMieux may not have been on notice that his registration was in jeopardy by virtue of the complaint issued by the Commission in this case. In addition, the Commission declines to prohibit respondents from trading on or subject to the rules of any contract market since there is no evidence in the record to establish that respondents' activities were conducted on, related to or had any adverse impact on trading conducted on any contract market.

Accordingly, for the reasons set forth above, the application for registration of Lloyd, Carr & Co. as a futures commission merchant is hereby denied; the registration of Lloyd Carr Financial as a commodity trading advisor is hereby revoked; and all respondents are hereby ordered to cease and desist from any further violations of the Act and the Commission's regulations, as charged.

By the Commission (Vice-Chairman RAINBOLT and Commissioners SIEVERS, DUNN and MARTIN). Chairman BAGLEY concurring.

CHAIRMAN BAGLEY, concurring: I concur, but would have remanded for proceedings leading to further findings and appropriate assessment of civil money penalties pursuant to Section 6(d) of the Act.

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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In the Matter of	:	CFTC Docket No. 77-6
	:	
JAMES A. CARR and	:	
CHARLES P. LEMIEUX, III d/b/a	:	
LLOYD, CARR & CO., a partnership	:	
	:	
JAMES A. CARR and	:	
CHARLES P. LEMIEUX, III d/b/a	:	
LLOYD CARR FINANCIAL CO.	:	ORDER DENYING REGISTRATION
	:	AND IMPOSING REMEDIAL
JAMES A CARR	:	SANCTIONS
	:	
CHARLES P. LEMIEUX, III	:	
	:	

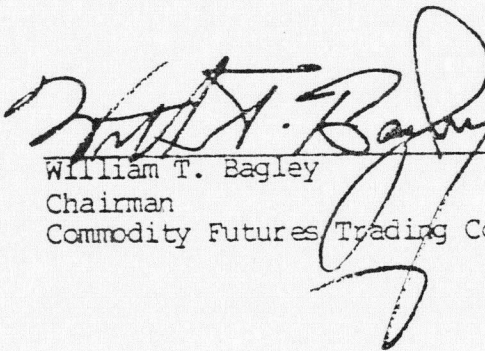
FINAL ORDER

The Commission, having reviewed the record and considered all of respondents' arguments and pending motions, has decided this case on the merits in the first instance pursuant to its expediting Order. We find respondents to be in violation of the Commodity Exchange Act, as amended, and the Commission regulations thereunder as charged for the reasons set forth in the Commission's Opinion dated August 1, 1977.

Accordingly, IT IS ORDERED that respondents' motion to disqualify Chairman Bagley and Vice-Chairman Rainbolt and respondents' request for oral argument are denied; IT IS FURTHER ORDERED that the application for registration of Lloyd, Carr & Co. as a futures commission merchant is hereby denied; the registration of Lloyd Carr Financial Company as

a commodity trading advisor is hereby revoked; and all respondents are ordered to cease and desist from any further violations of those provisions of the Act and the Commission's regulations with which they were charged, that is, Section 4c(b) of the Act, 7 U.S.C. §6c(b), and Sections 1.18, 1.31, 32.3 and 32.7 of the Commission's Regulations thereunder. This Order shall become effective upon service of a copy hereof upon respondents.

By the Commission (Vice-Chairman RAINBOLT and Commissioners SEEVERS, DUNN and MARTIN). Chairman BAGLEY concurring.



William T. Bagley
Chairman
Commodity Futures Trading Commission

Dated: August 1, 1977

